Attachment 1

APPROVED
MAY 13 '89
BY GOVERNOR

CHAPTER
148
PUBLIC LAWS

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-NINE

S.P. 152 - L.D. 272

An Act to Implement the Aroostook Band of Micmacs Settlement Act

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 3 MRSA §601, as enacted by PL 1983, c. 497, §1, is amended to read:

§601. Approval of legislation

When approval of legislation by an Indian tribe or Indian nation is required by the United States Code, Title 25, Section 1725(e), or other act of Congress, certification of that approval shall be made to the Secretary of State by the officer of the affected Indian tribe or Indian nation designated in section 602 or 603. The certification shall state the date and manner of approval of the legislation and shall be prima facie evidence of approval. The Secretary of State shall forthwith transmit certified copies of the certification of approval to the Secretary of the Senate and the Clerk of the House of Representatives.

Sec. 2. 3 MRSA §603 is enacted to read:

§603. Designation of officer; Aroostook Band of Micmacs

The council of the Aroostook Band of Micmacs shall designate, by name and title, the officer authorized to execute the certificate of approval of legislation required by section 501. The designation shall be in writing and filed with the Secretary of State no later than the first Wednesday in January in the First Regular Session of the Legislature. The Secretary of State shall forthwith transmit certified copies of the designation to the Secretary of the Senate and the Clerk of the House of Representatives. The designation shall remain in effect

until the council of the Aroostook Band of Micmacs makes a new designation.

Sec. 3. 30 MRSA c. 603 is enacted to read:

CHAPTER 603

MICMAC SETTLEMENT ACT

§7201. Short title

This Act shall be known and may be cited as "The Micmac Settlement Act."

§7202. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Aroostook Band of Micmacs. "Aroostook Band of Micmacs" means the sole successor to the Micmac Nation as constituted in aboriginal times in what is now the State of Maine, and all its predecessors and successors in interest. The Aroostook Band of Micmacs is represented, as of the date of enactment of this subsection, as to lands within the United States by the Aroostook Micmac Council.

2. Aroostook Band Trust Land. "Aroostook Band Trust Land" means land or natural resources acquired by the secretary in trust for the Aroostook Band of Micmacs, in compliance with the terms of this Act, with money from the original $900,000 congressional appropriation and interest thereon deposited in the Land Acquisition Fund established for the Aroostook Band of Micmacs pursuant to federal legislation concerning the Aroostook Band of Micmacs or with proceeds from a taking of Aroostook Band Trust Land for public uses pursuant to the laws of this State or the United States.

3. Land or other natural resources. "Land or other natural resources" means any real property or other natural resources, or any interest in or right involving any real property or other natural resources, including, but without limitation, minerals and mineral rights, timber and timber rights, water and water rights and hunting and fishing rights.

4. Laws of the State. "Laws of the State" means the Constitution and all statutes, rules or regulations and the common law of the State and its political subdivisions, and subsequent amendments thereto or judicial interpretations thereof.

5. Secretary. "Secretary" means the Secretary of the Interior of the United States.

6. Transfer. "Transfer" includes, but is not limited to, any voluntary or involuntary sale, grant, lease, allotment, partition or other conveyance; any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition or other conveyance; and any act, event or circumstance that resulted in a change in title to, possession of, dominion over, or control of land or other natural resources.

§7203. Laws of the State to apply to Indian Lands

Except as otherwise provided in this Act, the Aroostook Band of Micmacs and all members of the Aroostook Band of Micmacs in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

§7204. Acquisition of Aroostook Band Trust Land

1. Approval. The State of Maine approves the acquisition by the secretary of Aroostook Band Trust Land within the State of Maine provided as follows.

A. No land or natural resources acquired by the secretary may have the status of Aroostook Band Trust Land, or be deemed to be land or natural resources held in trust by the United States, until the secretary files with the Maine Secretary of State a certified copy of the deed, contract or other instrument of conveyance, setting forth the location and boundaries of the land or natural resources so acquired. Filing by mail shall be complete upon mailing.

B. No land or natural resources may be acquired by the secretary for the Aroostook Band of Micmacs until the secretary files with the Maine Secretary of State a certified copy of the instrument creating the trust described in section 7207, together with a letter stating that the secretary holds not less than $50,000 in a trust account for the payment of obligations of the Aroostook Band of Micmacs, and a copy of the claim filing procedures the secretary has adopted.

C. No land or natural resources located within any city, town, village or plantation may be acquired by the secretary for the Aroostook Band of Micmacs without the approval of the legislative body of the city, town, village or plantation.

2. Takings for public uses. Aroostook Band Trust Land may be taken for public uses in accordance with the laws of the State

B. Providing the consent of the United States for amendments to this Act, with respect to the Aroostook Band of Micmacs, provided that such amendment of this Act is made with the agreement of the Aroostook Band of Micmacs; and

2. Within 60 days of adjournment of the Legislature, the Secretary of State receives written certification by the Council of the Aroostook Band of Micmacs that the band has agreed to this Act, copies of which shall be submitted by the Secretary of State to the Secretary of the Senate and the Clerk of the House of Representatives, provided that in no event shall this Act become effective until 90 days after adjournment of the Legislature.

Attachment 2

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June 16, 2000

John Nale, Esq.
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Re: Aroostook Band of Micmacs

Dear John:

I have now had a chance to retrieve my original file concerning the settlement with the Aroostook Band of Micmacs. I have not found anything in my files that indicates that the Band filed a certificate with the Secretary of State as apparently required by the original state legislation implementing the Aroostook Band of Micmacs Settlement Act. *See* Chapter 148 of the Public Laws of 1989, § 4 (approved May 18, 1989). The Secretary of State's Office has informed me that they cannot locate such a certificate and Nan Heald of Pine Tree Legal Assistance in Portland, who was counsel to the Band of Micmacs throughout the settlement process, has checked her files and cannot find any certificate. She also indicated to me that she contacted Washington counsel who had no knowledge of such a certificate.

What I suspect happened is the following: the State Implementing Act originated as L.D. 272 in the 114th Maine Legislature (1st Regular Session - 1989). The original bill contained a section 8 dealing with its effective date. That provision only provided that it would be effective if the United States enacted appropriate legislation ratifying the Implementing Act without modification and providing the consent of the United States for amendments to the Implementing Act provided the Aroostook Band of Micmacs agreed. There was nothing in the original L.D. which called for the filing of a certificate by the Band.

There appears to have been two amendments to the L.D. The first was Committee Amendment "A" and appears to have redrafted the bill in its entirety. Once again, however, with respect to the effective date provision on the Committee Amendment, it only provided that effectiveness would depend upon the legislation by the United States ratifying and approving the Implementing Act without modification and providing for the consent of the United States for amendments to the Implementing Act provided the Aroostook Band of Micmacs agreed. House Amendment "A" to Committee Amendment "A" added the provision dealing with the effective date of the Implementing Act and

required that within 60 days of the adjournment of the Legislature, the Secretary of State was to receive a written certification by the Council of the Aroostook Band of Micmacs that the Band had agreed to the Implementing Act. Receipt of such certification was a condition of effectiveness of the Implementing Act.

As so amended, L.D. 272 was enacted into law and approved by the Governor on May 18, 1989.

My suspicion is that because the effective date language came in as a committee amendment shortly before enactment, members of the Band and perhaps Nan and others simply overlooked the certification requirement.

Have you had any luck checking with the Band itself to determine whether it has any records that would indicate it filed the appropriate certification?

What does the Band want to do about this, if anything?

Having now been advised of this situation, I am concerned that the Maine Implementing Act never became effective notwithstanding the enactment by the United States of legislation ratifying and approving it. I am not sure what the result is, but I suspect that the original State Implementing Act which dealt with the Penobscot Nation, the Passamaquoddy Tribe, and the Houlton Band of Maliseets, and all other Indian tribes, bands, and Indians, would still have application.

It seems to me that the situation can be easily remedied by bringing this to the attention of the Legislature next session and correcting this error by having the appropriate certification filed by the Band.

Please let me know what it is you want to do, what authority you have to represent any official of the Band, and what the next step is.

For your convenience, I have enclosed copies of the original L.D., the amendments to it, and the enacted law.

Sincerely,

WILLIAM R. STOKES
Assistant Attorney General

WRS:mhs
Enclosure
cc: Nan Heald, Esq.

Attachment 3

PART 4

CHAPTER 603

MICMAC SETTLEMENT ACT (HEADING: PL 1989, c. 148, §3 (new))

30 § 7201. Short title

(NOTE: Needs ratification by Indian tribes per Secretary of State) This Act shall be known and may be cited as "The Micmac Settlement Act." [1989, c. 148, §§3, 4 (new).]

Section History:
1989, c. 148, § 3,4 (NEW).

30 § 7202. Definitions

(NOTE: Needs ratification by Indian tribes per Secretary of State)

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings. [1989, c. 148, §§3, 4 (new).]

1. Aroostook Band of Micmacs. "Aroostook Band of Micmacs" means the sole successor to the Micmac Nation as constituted in aboriginal times in what is now the State of Maine, and all its predecessors and successors in interest. The Aroostook Band of Micmacs is represented, as of the date of enactment of this subsection, as to lands within the United States by the Aroostook Micmac Council. [1989, c. 148, §§3, 4 (new).]

2. Aroostook Band Trust Land. "Aroostook Band Trust Land" means land or natural resources acquired by the secretary in trust for the Aroostook Band of Micmacs, in compliance with the terms of this Act, with money from the original $900,000 congressional appropriation and interest thereon deposited in the Land Acquisition Fund established for the Aroostook Band of Micmacs pursuant to federal legislation concerning the Aroostook Band of Micmacs or with proceeds from a taking of Aroostook Band Trust Land for public uses pursuant to the laws of this State or the United States. [1989, c. 148, §§3, 4 (new).]

3. Land or other natural resources. "Land or other natural resources" means any real property or other natural resources, or any interest in or right involving any real property or other natural resources, including, but without limitation, minerals and mineral rights, timber and timber rights, water and water rights and hunting and fishing rights. [1989, c. 148, §§3, 4 (new).]

4. Laws of the State. "Laws of the State" means the Constitution and all statutes, rules or regulations and the common law of the State and its political subdivisions, and subsequent amendments thereto or judicial interpretations thereof. [1989, c. 148, §§3, 4 (new).]

5. Secretary. "Secretary" means the Secretary of the Interior of the United States. [1989, c. 148, §§3, 4 (new).]

6. Transfer. "Transfer" includes, but is not limited to, any voluntary or involuntary sale, grant, lease, allotment, partition or other conveyance; any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition or other conveyance; and any act, event or circumstance that resulted in a change in title to, possession of, dominion over, or control of land or other natural resources. [1989, c. 148, §§3, 4 (new).]

Section History:
1989, c. 148, § 3,4 (NEW).

30 § 7203. Laws of the State to apply to Indian Lands

(NOTE: Needs ratification by Indian tribes per Secretary of State) Except as otherwise provided in this Act, the Aroostook Band of Micmacs and all members of the Aroostook Band of Micmacs in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein. [1989, c. 148, §§3, 4 (new).]

Section History:
1989, c. 148, § 3,4 (NEW).

30 § 7204. Acquisition of Aroostook Band Trust Land

(NOTE: Needs ratification by Indian tribes per Secretary of State)

1. Approval. The State of Maine approves the acquisition by the secretary of Aroostook Band Trust Land within the State of Maine provided as follows.

A. No land or natural resources acquired by the secretary may have the status of Aroostook Band Trust Land, or be deemed to be land or natural resources held in trust by the United States, until the secretary files with the Maine Secretary of State a certified copy of the deed, contract or other instrument of conveyance, setting forth the location and boundaries of the land or natural resources so acquired. Filing by mail shall be complete upon mailing. [1989, c. 148, §§3, 4 (new).]

B. No land or natural resources may be acquired by the secretary for the Aroostook Band of Micmacs until the secretary files with the Maine Secretary of State a certified copy of the instrument creating the trust described in section 7207, together with a letter stating that the secretary holds not less than $50,000 in a trust account for the payment of obligations of the Aroostook Band of Micmacs, and a copy of the claim filing procedures the secretary has adopted. [1989, c. 148, §§3, 4 (new).]

C. No land or natural resources located within any city, town, village or plantation may be acquired by the secretary for the Aroostook Band of Micmacs without the approval of the legislative body of the city, town, village or plantation. [1989, c. 148, §§3, 4 (new).]

[1989, c. 148, §§3, 4 (new).]

2. Takings for public uses. Aroostook Band Trust Land may be taken for public uses in accordance with the laws of the State to the same extent as privately owned land. The proceeds from any such taking shall be deposited in the Land Acquisition Fund. The United States shall be a necessary party to any such condemnation proceeding. After exhausting all state administrative remedies, the United States shall have an absolute right to remove any action commenced in the courts of this State to a United States court of competent jurisdiction. [1989, c. 148, §§3, 4 (new).]

3. Restraints on alienation. Any transfer of Aroostook Band Trust Land shall be void ab initio and without any validity in law or equity, except:

A. Takings for public uses pursuant to the laws of this State; [1989, c. 148, §§3, 4 (new).]

B. Takings for public uses pursuant to the laws of the United States; [1989, c. 148, §§3, 4 (new).]

C. Transfers of individual use assignments from one member of the Aroostook Band of Micmacs to another band member; [1989, c. 148, §§3, 4 (new).]

D. Transfers authorized by federal law ratifying and approving this Act; and [1989, c. 148, §§3, 4 (new).]

E. Transfers made pursuant to a special act of Congress. [1989, c. 148, §§3, 4 (new).]

If the fee to the Aroostook Band Trust Land is lawfully transferred to any person or entity, the land so transferred shall cease to have the status of Aroostook Band Trust Land. [1989, c. 148, §§3, 4 (new).]

Section History:
1989, c. 148, § 3,4 (NEW).

30 § 7205. Powers of the Aroostook Band of Micmacs

(NOTE: Needs ratification by Indian tribes per Secretary of State) The Aroostook Band of Micmacs shall not exercise nor enjoy the powers, privileges and immunities of a municipality nor exercise civil or criminal jurisdiction within their lands prior to the enactment of additional legislation specifically authorizing the exercise of those governmental powers. [1989, c. 148, §§3, 4 (new).]

Section History:
1989, c. 148, § 3,4 (NEW).

30 § 7206. Taxation

(NOTE: Needs ratification by Indian tribes per Secretary of State)

1. Property taxes. The Aroostook Band of Micmacs shall make payments in lieu of taxes on Aroostook Band Trust Land in an amount equal to that which would otherwise be imposed by a municipality, county, district, the State or other taxing authority on that land or natural resource. [1989, c. 148, §§3, 4 (new).]

Section History:
1989, c. 148, § 3,4 (NEW).

30 § 7207. Aroostook Band Tax Fund

(NOTE: Needs ratification by Indian tribes per Secretary of State)

1. Fund. The satisfaction of obligations, described in section 7206, owed to a governmental entity by the Aroostook Band of Micmacs shall be assured by a trust fund to be known as the Aroostook Band Tax Fund. The secretary shall administer the fund in accordance with reasonable and prudent trust management standards. The initial principal of the fund shall be not less than $50,000. The principal shall be formed with money transferred from the Land Acquisition Fund established for the Aroostook Band of Micmacs pursuant to federal legislation concerning the Aroostook Band of Micmacs. Any interest earned by the Aroostook Band Tax Fund shall be added to the principal as it accrues and that interest shall be exempt from taxation. The secretary shall maintain a permanent reserve of $25,000 at all times and that reserve shall not be made available for the payment of claims. The interest earned by the reserved funds

shall also be added to the principal available for the payment of obligations. [1989, c. 148, §§3, 4 (new).]

2. Claims. The secretary shall pay from the fund all valid claims for taxes, payments in lieu of property taxes and fees, together with any interest and penalties thereon, for which the Aroostook Band of Micmacs is liable pursuant to section 7206, provided that such obligation is final and not subject to further direct administrative or judicial review under the laws of the State. No payment of a valid claim may be satisfied with money from the fund unless the secretary finds, as a result of the secretary's own inquiry, that no other source of funds controlled by the secretary is available to satisfy the obligation. The secretary shall adopt written procedures, consistent with this section, governing the filing and payment of claims after consultation with the Commissioner of Finance and the Commissioner of Administration and the Aroostook Band of Micmacs. [1989, c. 148, §§3, 4 (new).]

3. Distributions. If the unencumbered principal available for the payment of claims exceeds the sum of $50,000, the secretary shall, except for good cause shown, provide for the transfer of such excess principal to the Aroostook Band of Micmacs. The secretary shall give 30 days' written notice to the Commissioner of Finance and the Commissioner of Administration of a proposed transfer of excess principal to the Aroostook Band of Micmacs. Any distribution of excess principal to the Aroostook Band of Micmacs shall be exempt from taxation. [1989, c. 148, §§3, 4 (new).]

4. Other remedies. The existence of the Aroostook Band Tax Fund as a source for the payment of the obligations of the Aroostook Band of Micmacs shall not abrogate any other remedy available to a governmental entity for the collection of taxes, payments in lieu of taxes and fees, together with any interest or penalty thereon. [1989, c. 148, §§3, 4 (new).]

Section History:
1989, c. 148, § 3,4 (NEW).

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Attachment 4

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HRI, INC., Petitioner,	)	
v.	)	No. 97-9556
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	
NEW MEXICO ENVIRONMENT DEPARTMENT, Petitioner,	)	
v.	)	No. 97-9557
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	
NAVAJO NATION, Intervenor.	)	

PETITION FOR REVIEW OF A DECISION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF OF RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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Oral argument is desired.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: PAGE

STATUTES:

STATEMENT REGARDING PRIOR OR RELATED APPEALS

There are no prior or related appeals or petitions for review.

STATEMENT OF JURISDICTION

Respondent Environmental Protection Agency ("EPA" or the "Agency") disagrees with Petitioners' statements of jurisdiction. One of the decisions that Petitioners seek to have this Court review is a December 1993 determination by EPA that a parcel of land known as "Section 17" is "Indian land" within the meaning of EPA's regulations under the Safe Drinking Water Act, 42 U.S.C. §§ 300f - 300j-26 ("SDWA" or the "Act"). (R., Vol. I, No. 14.) Under the SDWA, petitions for review must be filed within 45 days of the action as to which review is sought, unless "the petition is based solely on grounds arising after the expiration of such period." 42 U.S.C. § 300j-7(a). The instant petitions were not filed until August 1997. Neither Petitioner has identified any permissible ground justifying their late filing, and this Court is therefore without jurisdiction insofar as Section 17 is concerned.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the petitions for review are timely, under 42 U.S.C. § 300j-7(a), as to the parcel of land known as Section 17, when EPA has held since November 1993 that Section 17 is Indian land within the meaning of 40 C.F.R. § 144.3. (R., Vol. I, Nos. 14, 15.)

2. Whether Section 17, which is held by the United States in trust for the Navajo Nation and which was acquired with funds specifically appropriated by Congress for the acquisition of lands to be held in trust by the United States for the Navajo Nation, is "Indian country" within the meaning of 18 U.S.C. § 1151(a) and therefore "Indian land" within the meaning of 40 C.F.R. § 144.3. (R., Vol. I, Nos. 14, 15, 48.)

3. Whether EPA is entitled to a remand of its determination that Section 8's "dependent Indian community" status is in dispute, in light of the Supreme Court's recent

opinion in Alaska v. Native Village of Venetie Tribal Government, No. 96-1577, 1998 WL 75038 (U.S. Feb. 25, 1998). (R., Vol. I, No. 48.)

STATEMENT OF THE CASE

A. Introduction

It has long been settled that regulatory jurisdiction over Indian lands rests primarily either with the federal government or with the Indian tribes themselves. To this end, the SDWA, which serves to protect sources of drinking water against contamination, provides that Indian tribes may regulate their own lands, in lieu of the federal government, in certain circumstances. Specifically, in 1986, the SDWA was amended to allow, among other things, Indian tribes to apply to EPA for "treatment as a state." Of particular significance in the present case, Indian tribes that are eligible for treatment in the same manner as a state may, like any other state, apply to EPA for authority to act as the primary regulator of mining-related underground injection activities that take place on lands determined to be within their jurisdiction.

The SDWA requires that, where an applicable underground injection control program does not exist for an Indian tribe, EPA shall prescribe one. To this end, EPA has promulgated various underground injection control programs applicable to Indian lands.

To determine whether a particular parcel of land is subject to federal jurisdiction, EPA has in its regulations adopted the definition of "Indian country" contained in 18 U.S.C. § 1151. Lands that fall within the definition of "Indian country" generally are subject to the primary regulatory jurisdiction of the tribes or EPA. Lands that do not fall within this definition may be regulated by EPA or, if approved by EPA, by the state within whose boundaries those lands lie. In its regulations implementing the SDWA, EPA recognized that instances would likely arise in

which an Indian tribe claims that a particular parcel of land is Indian country and a state claims that it is not. In order to ensure effective regulation of injection wells and minimize disruption, EPA determined that such disputed lands would remain subject to federal primary jurisdiction pending resolution of the dispute.

The present case arose when EPA asserted federal jurisdiction under the SDWA over two parcels of land in New Mexico because it had determined that one — known as Section 17 — was Indian country and that the other — known as Section 8 — was disputed Indian country. Both the New Mexico Environment Department ("NMED") and HRI, which has been issued a state permit for Section 8 and which is also a potential applicant for an underground injection control permit covering Section 17, have petitioned for review of EPA's assertion of jurisdiction.

B. Statutory and Regulatory Background

1. The Safe Drinking Water Act's UIC Program

Congress enacted the Safe Drinking Water Act ("SDWA" or "Act"), 42 U.S.C. §§ 300f - 300j-26, in 1974 to ensure that the nation's sources of drinking water are protected against contamination. Part C of the SDWA, 42 U.S.C. §§ 300h - 300h-8, established a regulatory program "to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h(b).[1/] Among other things, the Act directed EPA to promulgate regulations containing

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1/ EPA regulates five classes of wells pursuant to this mandate. See 40 C.F.R. § 144.6. This petition involves injection wells falling within Class III, which is defined as:

> Wells which inject for extraction of minerals including: [¶](1) Mining of sulfur by the Frasch process; [¶] (2) In situ production of uranium or other metals; this category includes only in-situ production from ore bodies which have not been conventionally mined. Solution mining of conventional mines such as stopes leaching is included in Class V. [¶] (3) Solution mining of salts or potash.

(continued...)

minimum requirements for state underground injection control (UIC) programs, 42 U.S.C. § 300h, and required all states that had been identified by EPA to submit UIC programs that met those minimum requirements. 42 U.S.C. § 300h-1; see also 40 C.F.R. § 144.1(e) (requiring all 50 states to submit UIC programs). Once EPA approves a state UIC program, that state is granted "primary enforcement responsibility" ("primacy") for administering that UIC program. 42 U.S.C. § 300h-1(b)(3). The Act also directed EPA to promulgate a federal UIC program that meets the minimum requirements of the Act, to cover those circumstances where EPA disapproves a state's UIC program or where a state fails to submit a UIC program for approval. 42 U.S.C. § 300h-1(c). EPA UIC programs promulgated pursuant to this provision are referred to as "direct implementation" programs. See, e.g., 52 Fed. Reg. 17,684 (1987). (R., Vol. II, No. 55.)

Congress amended the SDWA in 1986 to allow Indian tribes to be treated under the Act in a manner similar to states. Section 1451 of the Act permits EPA to treat Indian tribes as states under the SDWA where:

> (A) the Indian Tribe is recognized by the Secretary of the Interior and has a governing body carrying out substantial governmental duties and powers; (B) the functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction; and (C) the Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this subchapter and of all applicable regulations.

42 U.S.C. § 300j-11(b)(1). See also 40 C.F.R. §§ 145.52, 145.56. Among other things, an Indian Tribe that is eligible for "treatment as a state" may be granted primacy for its own UIC program. 42 U.S.C. § 300h-1(e). The Act also specifies which program governs in the interim:

1/ (...continued)
40 C.F.R. § 144.6(c).

> Until an Indian Tribe assumes primary enforcement responsibility, the currently applicable underground injection control program shall continue to apply. If an applicable underground injection control program does not exist for an Indian Tribe, the Administrator shall prescribe such a program pursuant to subsection (c) of this section [42 U.S.C. § 300h-1(c)], and consistent with section 300h(b) of this title, . . . unless an Indian Tribe first obtains approval to assume primary enforcement responsibility for underground injection control.

42 U.S.C. § 300h-1(e). Pursuant to this mandate, EPA in 1987 and 1988 promulgated a federal UIC program for Indian country. See discussion infra pp. 8-9.[2/]

No matter which entity exercises primacy under the SDWA, new underground injection is prohibited unless specifically authorized by a permit or by rule. See 40 C.F.R. §§ 144.11, 144.31. In addition, injection wells cannot be operated in a manner that would allow contamination to move into an "underground source of drinking water."[3/] 40 C.F.R. §144.12(a).[4/]

2/ Prior to the 1986 Amendments to the SDWA, EPA had promulgated a specific program for Class II wells on the Osage Mineral Reserve. See 40 C.F.R. §§ 147.2901 to 2909; see also 40 C.F.R. § 144.2. EPA's authority to promulgate specific UIC programs under the SDWA for Indian country prior to the 1986 Amendments was upheld in Phillips Petroleum Co. v. EPA, 803 F.2d 545 (10th Cir. 1986).

3/ An "underground source of drinking water" is defined to mean:

> an aquifer or its portion: [¶] (a)(1) [w]hich supplies any public water system; or [¶] (2) [w]hich contains a sufficient quantity of ground water to supply a public water system; and [¶] (i) [c]urrently supplies drinking water for human consumption; or [¶] (ii) [c]ontains fewer than 10,000 mg/l total dissolved solids; and [¶] (b) [w]hich is not an exempted aquifer.

40 C.F.R. § 144.3.

4/ 40 C.F.R. § 144.12(a) provides in full that:

> [n]o owner or operator shall construct, operate, maintain, convert, plug, abandon, or conduct any other injection activity in a manner that allows the movement of fluid containing any contaminant into underground sources of drinking water, if the presence of that contaminant may cause a violation of any primary drinking water regulations

(continued...)

Thus, to be approved, a state or tribal UIC program must, among other things, prohibit underground injection unless authorized by permit or rule and prohibit the movement of contaminants into underground sources of drinking water. 40 C.F.R. § 145.11(a)(5), (6).

An aquifer that is an underground source of drinking water may be exempted from the SDWA's general prohibition against injection if: (1) it does not currently serve as a source of drinking water; (2) because of its physical characteristics, it will never serve as a source of drinking water; and (3) it has been identified and approved by EPA as an "exempted aquifer" in a permit or program approval. 40 C.F.R. §§ 144.7, 146.4.

Tribes and states granted primacy over a UIC program may, as part of that program, identify underground sources of drinking water and exempted aquifers. 40 C.F.R. §144.7(a), (b).[5/] Because exempted aquifers are not subject to the protections generally afforded to underground sources of drinking water, a state's or a tribe's designation of an aquifer as an "exempted aquifer" is not "final until approved by the Administrator as part of a UIC program." 40 C.F.R. § 144.7(b)(2). Exempt aquifers identified by a state or tribe after the grant of primacy must be approved by EPA and are treated as a revision to the tribal or state UIC program under 40 C.F.R. § 145.32. 40 C.F.R. § 144.7(b)(2).

4/ (...continued)
under 40 C.F.R. part 142 or may otherwise adversely affect the health of persons.

National primary drinking water regulations ("NPDWRs") are found at 40 C.F.R. Pt. 142 and are promulgated under the SDWA. Among other things, NPDWRs consist of "maximum contaminant levels" or treatment techniques set for specific contaminants in order to ensure the protection of human health.

5/ An aquifer that is not listed by a state or tribe with primacy is still considered an underground source of drinking water as long as it meets the definition of an underground source of drinking water set forth in 40 C.F.R. § 144.3. 40 C.F.R. § 144.7(a).

Under the SDWA, EPA exercises "primary enforcement authority," or "primacy," over lands that meet the definition of "Indian lands" under 40 C.F.R. § 144.3. In that regulation, EPA defines "Indian lands" to mean lands which are "Indian country" under 18 U.S.C. § 1151. "Indian country" is defined in 18 U.S.C. § 1151 as:

> (a) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;
>
> (b) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State; and
>
> (c) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.[6] See also 40 C.F.R. § 144.3.

2. The State of New Mexico's Primacy

On July 11, 1983, EPA granted New Mexico primacy over all Class III injection wells in the state, except over those in Indian country. 48 Fed. Reg. 31,640 (1983).[7] EPA stated, "[t]he EPA will implement a UIC program on Indian lands in New Mexico after consultation with the Indian tribes, the State, other interested organizations and the public." 48 Fed. Reg. at 31,640.[8]

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[6] Although it is part of the Title 18, the federal criminal code, the Supreme Court has recognized that section 1151 defines Indian country for questions of civil jurisdiction as well. DeCoteau v. District County Court for Tenth Judicial Dist., 420 U.S. 425, 427 n.2 (1975).

[7] (R., Vol. II, No. 51.) That grant of primacy also included injection wells in Classes I, IV and V. Earlier, on February 5, 1982, EPA had granted New Mexico primacy over Class II injection wells. 47 Fed. Reg. 5412 (1982). (R., Vol. II, No. 50.) As with the Class III wells, in each of these cases, EPA specifically excluded Indian country from New Mexico's grant of primacy.

[8] EPA's approval of New Mexico's UIC program was codified at 40 C.F.R. Part 147, (continued...)

As required by 40 C.F.R. § 145.25, in April 1983, EPA Region 6 and the State of New Mexico entered into a Memorandum of Agreement that detailed the "responsibilities and procedures" under New Mexico's primacy program. (R., Vol. VI, No. 110.) Under its program, New Mexico identifies exempted aquifers for Class III wells through "temporary aquifer designations." Section VII of the Memorandum of Agreement requires that New Mexico submit each temporary aquifer designation to EPA for approval or disapproval and that EPA state the reasons for any disapproval of a temporary aquifer designation in writing. Approval or disapproval of a temporary aquifer designation is considered a revision to the New Mexico UIC primacy program and is governed by 40 C.F.R. § 145.32. See 40 C.F.R. § 144.7(b)(3).[9/]

3. The Federal Direct Implementation UIC Program for Indian Country in New Mexico

Pursuant to Section 1422(e) of the SDWA, 42 U.S.C. § 300h-1(e), EPA in 1988 promulgated a federal UIC program that applies to all Indian country in New Mexico. 53 Fed. Reg. 43,096 (1988) (codified at 40 C.F.R. Pt. 147, subpart HHH). (R., Vol II, No. 58.) EPA issued this federal UIC program, in part, at the request of the Navajo Nation and other Indian tribes. Id. On November 25, 1988, this program became the "currently applicable" UIC program

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[8/] (...continued)
Subpart GG, on May 11, 1984. See 49 Fed. Reg. 20,138, 20,212 (May 11, 1984) (R., Vol. II, No. 52.) On October 25, 1988, simultaneous with finalizing the UIC program for Indian country in New Mexico, EPA amended 40 C.F.R. Part 147, subpart GG, to codify the exclusion of Indian country from the New Mexico UIC primacy program. 53 Fed. Reg. 43,084, 43,089 (1988). (R., Vol. II, No. 57.)

[9/] Disapproval of a requested aquifer exemption subsequent to the initial granting of Primacy "shall state the reasons [for disapproval] and shall constitute final Agency action for purposes of judicial review." 40 C.F.R. § 144.7(b)(3).

for all classes of injection wells for all Indian country, including Navajo Indian country, in New Mexico.[10/]

Importantly, the preamble to the final rule establishing this federal UIC program for Indian country provides that, when there is a dispute regarding the Indian country status of an area, "[i]n order to ensure regulation of injection wells and minimize any disruption, pending the resolution of jurisdictional disputes, EPA will implement the Federal UIC program for disputed lands." 53 Fed. Reg. at 43,097.

4. The Navajo Nation's Application for "Treatment as a State"

As noted supra p. 4, since 1986 the SDWA has provided that Indian tribes may, among other things, apply to EPA for grants and for primacy over UIC programs within their jurisdiction in the same manner as states. In March 1993, the Navajo Nation applied to EPA Region 9 for treatment in the same manner as a state for the purpose of obtaining a grant under section 1443(b) of the Act, 42 U.S.C. § 300j-2(b).[11/] (R., Vol. V, No. 102.) Under the regulations then applicable, EPA provided a copy of the Navajo Nation's jurisdictional claims to other governmental entities, including the State of New Mexico, that could have been affected by the Navajo Nation's claims. (R., Vol. V, Nos. 103 and 104.) On May 24, 1993, NMED provided comments to EPA on the Navajo Nation's application, objecting to some of the jurisdictional

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10/ 40 C.F.R. Pt. 147, subpart HHH also applies to all Navajo Indian country in Arizona and Utah, as well as to Class II wells on Ute Mountain Ute Indian country in Colorado and all well on Ute Mountain Ute Indian country in Utah. See 40 C.F.R. § 147.3000(a).

11/ The Navajo Nation had submitted an application for treatment in the same manner as a state prior to 1993, and EPA had provided notice to other governments and received comment. However, EPA did not make a determination regarding the application and the Navajo Nation resubmitted its application in March 1993. (See R., Vol. V, Nos. 96 to 100.)

claims. (R., Vol. V, No. 105.) The Navajo Nation Department of Justice responded to NMED's comments on July 30, 1993. (R., Vol. V, No. 108.)

On September 20, 1994, EPA approved in part the Navajo Nation's application for treatment in the same manner as a state, for the purposes of obtaining a grant to develop a UIC program, finding that the Navajo Nation had met the requirements of section 1451(b) of the Act, 42 U.S.C. § 300j-11(b), (R., Vol. VI, No. 112), at least as to certain lands. More specifically, EPA found that the Navajo Nation had demonstrated its jurisdiction with respect to the formal Navajo Reservation and to "all Navajo tribal trust lands, all Navajo allotments within the Eastern Navajo Agency, the three 'satellite' reservations of Ramah, Canoncito, and Alamo, and tribal fee lands and federal lands that had been previously determined to be part of 'Indian country.' " (Id. at 25.) EPA also found, however, "that the Navajo Nation has not satisfied the third criterion for [treatment in the same manner as a state] under section 1451 of the SDWA for federal land and tribal fee lands (except for the lands in these categories that have already been determined to be part of 'Indian country'), private fee lands, and New Mexico state trust lands within the Eastern Navajo Agency." (Id.) EPA qualified this finding, however, stating:

> It is important to note what determination EPA is and is not making in this case at this time. For those categories of lands for which EPA cannot determine whether the Navajo Nation has jurisdiction, EPA is simply stating that the Navajo Nation has not adequately shown that it does have jurisdiction. However, EPA is not determining that the Navajo Nation does not have jurisdiction. Neither is EPA determining whether or not such lands are "Indian lands" for the purposes of EPA's UIC program in New Mexico.

(Id. at 20.) To date, the Navajo Nation has not applied for primacy for its UIC program.

C. Factual Background

1. Introduction

HRI proposes to conduct in-situ uranium mining near Church Rock, New Mexico (in northwest New Mexico near the boundary of the formal Navajo Reservation). Because HRI's proposed project involves the underground injection of a solution of sodium bicarbonate for the purposes of recovering uranium, HRI's project requires a Class III UIC permit issued under the SDWA. Moreover, because the proposed injection will be into an underground source of drinking water, HRI must first obtain an aquifer exemption under the applicable UIC program.

The land around Church Rock is not presently part of any formal reservation; rather, it is located in an area, commonly known as the "EO709/744 area," that was once a part of the Navajo Nation that straddles the border between New Mexico and Arizona. The EO709/744 area was the product of two executive orders that, together, temporarily added certain lands to the aforementioned Navajo Reservation. See Exec. Order No. 709 (1907), reprinted in 3 C. Kappler, Indian Affairs: Laws and Treaties, 669 (1913); Exec. Order No. 744 (1908), reprinted in 3 C. Kappler, supra, at 669. The EO709/744 area "consisted of approximately seventy-nine townships (1.9 million acres) in New Mexico and forty-seven (one million acres) in Arizona." Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1391 (10th Cir. 1990) ("P&M I"). By 1911, most of the EO709/744 area was "abolished" and unallotted lands therein returned to the public domain. See Exec. Order Nos. 1000 (1908) and 1284 (1911), reprinted in 3 C. Kappler, supra, at 685, 686; P&M I, 909 F.2d at 1392. In P&M I, this Court subsequently ruled that Executive Orders 1000 and 1284 "disestablished" the boundaries of the EO 709/744 area in New Mexico as an addition to the Navajo Reservation. Id.

The proposed mine site at Church Rock is located within the EO 709/744 Area on the following contiguous sections within Township Sixteen North, Range Sixteen West, New Mexico Prime Meridian: the southeast quarter of Section 8 ("Section 8") and Section 17 ("Section 17"). (See R., Vol. III, No. 63, attached appendix.) Section 17 was purchased by the United States in 1929 from the Santa Fe Railroad Company ("Santa Fe") and, pursuant to the deed, is to this day held by the United States in trust for the benefit of the Navajo Nation. (See R., Vol. III, No. 65, attachment K; Vol. IV, No. 73, Exhibit B.) In the 1929 deed, Sante Fe retained ownership of the mineral estate underlying Section 17 for itself. HRI now owns that mineral estate. HRI owns its interest at Section 8 (including the mineral estate) in fee simple.[12/]

2. NMED's Permit for HRI's In-Situ Mining Project on Sections 8 and 17

In 1989, NMED approved HRI's Class III UIC Permit or Discharge Plan (Discharge Plan or DP-558) for HRI's mining project on Section 8. (See R., Vol. IV., No. 86, page 9.) Under New Mexico's primacy UIC program, HRI is required to obtain a temporary aquifer designation (or aquifer exemption) from NMED before injecting into an underground source of drinking water. Therefore, pursuant to the Memorandum of Agreement between EPA and New Mexico, NMED submitted a proposed temporary aquifer designation for HRI's project on Section 8 to EPA Region 6 for approval. EPA Region 6 approved the temporary aquifer designation for HRI's project on Section 8 on June 21, 1989. (R., Vol. I, No. 19, attachment to letter.)

12/ The exact amount of property owned by HRI in Section 8 is unclear. At some places in the Record the amount seems to be 160 acres (the southeast quarter of Section 8); at other places in the Record, the amount is claimed to be 174 or 174.564 acres. (Cf. HRI's Brief, at 2; R., Vol. IV, No. 89, at p. 1 to 4; and R., Vol. III, No. 63, attachment.)

In September 1992, HRI applied to NMED to amend its UIC Permit (DP-558) for Section 8 to include the proposed operations on Section 17. (R., Vol. I, No. 1.) In April 1993, in connection with HRI's application for an amended permit, NMED sought approval from EPA Region 6 to extend the existing temporary aquifer designation into Section 17. (R., Vol I, No. 3.) Initially, EPA deferred action on the temporary aquifer designation approval request until after NMED's public hearing and public comment period. (See R., Vol. I, No. 7.) EPA later determined, however, that Section 17 is Indian country and therefore met the definition of "Indian land" at 40 C.F.R. § 144.3. Therefore, in a letter dated November 23, 1993, from the Director of the Water Management Division of EPA Region 6 to the Secretary of NMED, EPA Region 6 declined to approve the temporary aquifer designation extension for HRI's proposed project on Section 17. (R., Vol. I, No. 14.) Instead, it informed NMED and HRI that, because EPA Region 9 has jurisdiction over Navajo Indian country in New Mexico, HRI should apply to Region 9 for federal SDWA permits and any required aquifer exemptions. (R., Vol. I, No. 14, 15.) HRI was sent a copy of the November 23 letter. In addition, EPA Region 6 sent a separate letter to HRI on December 29, 1993, informing HRI of EPA's determination. (R., Vol. I, No. 15.)[13/]

Neither NMED nor HRI challenged EPA's 1993 determination that the temporary aquifer designation extension request could not be approved because Section 17 is Indian country. Nor did NMED thereafter seek a revision to its UIC primacy program to include Section 17. Rather,

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[13/] In October 1994, EPA again informed HRI that in order to conduct its proposed UIC operations on Section 17, it was required to obtain a federal UIC permit and aquifer exemption from EPA Region 9. (R., Vol. I, No. 17.) NMED obtained a copy of the October 24, 1994, letter and responded to EPA Region 9. (R., Vol. I, No. 18.)

NMED chose to treat EPA's determination as nonbinding and continued to process HRI's requested amendment to DP-558 under the state UIC program. In response, in October and November 1993, the Navajo Nation filed with the NMED Hearing Officer its motions to dismiss the state permit proceeding for lack of subject matter jurisdiction. It argued, first, that Section 17 was within Indian country and therefore not within NMED's UIC primacy program and, second, that NMED was preempted from exercising authority over HRI's proposed project on Section 17. (R., Vol. IV, Nos. 72 and 73.) NMED and HRI replied to the Navajo Nation's motions, both arguing that Section 17 is not Indian country, that New Mexico was not preempted by EPA's ruling from regulating HRI's project, and that New Mexico did, in fact, have jurisdiction over the proposed project despite EPA's assertion of jurisdiction. (R., Vol. IV, Nos. 74 and 75.) EPA was not a party to, and did not participate in, any aspect of these proceedings.

On May 9, 1994, the NMED Hearing Officer denied the Navajo Nation's motions to dismiss, holding that NMED had "the authority to regulate the State UIC program on the 200 acres involved in this application [Section 17]" and that Section 17 was not Indian country. (R., Vol. IV, No. 85, at 10.) The Hearing Officer's "Recommended Findings of Fact and Conclusions of Law with Proposed Decision and Order" reflecting those rulings was issued on June 23, 1994. (R., Vol. IV, No. 86.) On October 7, 1994, the Secretary of NMED adopted the Hearing Officer's findings and conclusions and approved the amendment to DP-558 to include Section 17. (R., Vol. IV, No. 87.) The Navajo Nation appealed this decision to the New Mexico Water Quality Control Commission, but its appeal was dismissed as untimely. (See R., Vol. IV, Nos. 88-94.)

On August 3, 1995, after the decision of the Secretary of NMED on the proposed amendment to DP-558, NMED again asked EPA Region 6 to approve the extension of the Section 8 temporary aquifer designation to include Section 17. (R., Vol. I, No. 19.) In a letter dated August 24, 1995, Region 6 again informed NMED that, because Section 17 is Indian country, EPA could not approve the temporary aquifer designation under the New Mexico UIC primacy program and that HRI must obtain a UIC permit and aquifer exemption from EPA Region 9. (R., Vol. I, No. 20.)

Again, neither NMED nor HRI challenged EPA's disapproval of the temporary aquifer designation request. NMED did, however, initiate discussions with EPA regarding "joint permitting" of HRI's project on Section 17. Between October 1995 and December 1996, NMED, EPA and the Navajo Nation held meetings and exchanged correspondence to explore whether all three governments might agree on a process pursuant to which one or more of the parties would jointly issue a permit to HRI for the proposed operations on Section 17. HRI participated in some of these discussions. (See R., Vol. I, Nos. 23 to 41.) Throughout these negotiations, EPA repeatedly informed NMED, HRI and the Navajo Nation that under any "joint permitting" scenario, HRI must obtain a federal UIC permit and aquifer exemption for Section 17 from EPA Region 9. (See R., Vol. I, Nos. 27, 28, 31, 37, 41.)[14/]

Commenting on NMED's proposed renewal of HRI's DP-558, the Navajo Nation informed EPA by letter dated October 21, 1996, that it believed that joint permitting of HRI's project on Section 17 would be inappropriate and that EPA Region 9 has the sole responsibility

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14/ On March 4, 1996, NMED provided a "Draft Joint Powers Agreement" to EPA and the Navajo Nation for review. (R., Vol. I, No. 29.) Both EPA and the Navajo Nation replied that the "Joint Powers Agreement" could not be executed as drafted. (R., Vol. I, Nos. 31 and 32.)

for UIC permitting over the project because of the Indian country status of that land. (R., Vol. I, No. 39.)[15/] On December 5, 1996, EPA Region 9 forwarded the October 21 letter to NMED, informing NMED that the Navajo Nation had "rejected the idea of a joint permit for section 17." (R., Vol. I, No. 40.) EPA did suggest, however, in a letter to NMED dated February 11, 1997, that although the Agency's "position remains that Section 17 is Indian country . . . , since you [NMED] obviously disagree and believe that jurisdiction is in dispute," EPA could issue any UIC permit for Section 17 based on NMED's assertion that jurisdiction was "in dispute." (R., Vol. I, No. 44, at 2.) On March 24, 1997, EPA sent a similar letter to HRI. (R., Vol. I, No. 46.)

In its October 21, 1996, letter the Navajo Nation also objected to NMED's renewal of DP-558 for Section 8 because, according to the Navajo Nation, Section 8 is within a dependent Indian community and is therefore Indian country and thus beyond the jurisdiction of NMED. The Navajo Nation also requested that EPA Region 9 process any permit applications for HRI's project under the federal SDWA. In forwarding a copy of the October 21 letter to NMED, EPA requested that NMED provide "any comments or other information regarding the jurisdictional status of Section 8 that NMED would like EPA to consider." (R., Vol. I, No. 40.)

NMED responded, claiming that the Indian country status of Section 8 (and Section 17) had been determined in the course of the NMED permit process, as well as in a separate state court proceeding, see infra pp. 17-19, and that EPA had not previously questioned NMED's authority over Section 8. (R. Vol. I, No. 42.) The Navajo Nation later supplied additional information to EPA addressing these issues. (R., Vol. I, No. 45.)

15/ The Navajo Nation also asserted that Section 8 was within Indian country and therefore subject to EPA, rather than NMED, authority under the SDWA. (See discussion infra.)

After reviewing the assertions and information provided by the Navajo Nation and NMED, and reviewing information from the state court proceeding cited by NMED, the NMED permit process, and other information previously submitted by the Petitioners, EPA, applying the four-factor test for "dependent Indian communities" set forth by this Court in Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531 (10th Cir. 1995) ("P&M II"), determined that the Indian country status of Section 8 was in dispute. (See R., Vol. I, No. 48, Vol. II, No. 61.) EPA informed NMED of its decision by letter dated July 14, 1997. In that letter, EPA informed NMED that, because the status of Section 8 was in dispute, pursuant to the federal UIC program promulgated on October 25, 1988, "HRI must obtain its federal SDWA permit for Section 8 from EPA." (R. Vol. I, No. 48, at 2.)[16/] In a letter dated July 15, 1997, EPA informed HRI of its determination, requesting that HRI submit a UIC permit application for Section 8 to EPA Region 9. (R., Vol. VI, No. 113.)

Subsequent to EPA's determination, on February 25, 1998, the Supreme Court issued its opinion in Venetie. In Venetie, the Supreme Court rejected a six-part "balancing" test employed by the Ninth Circuit for determining whether lands fall within a dependent Indian community. That test was similar in many respects to the four-part test, set forth by this Court in P&M II, under which EPA had analyzed the status of Section 8.

3. The Related State Water Diversion Permit Application

As noted above, one of the bases for NMED's argument that Section 17 and Section 8 are not Indian country is a series of proceedings before the New Mexico State Engineer ("State

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16/ EPA also informed NMED in that letter that its determination regarding the Indian country status of Section 17 had not changed. (R., Vol. I, No. 48, at 2.)

Engineer") and a state court regarding a state water diversion permit, in the course of which it was held that Sections 17 and 8 were not Indian country. On February 14, 1991, United Nuclear Corporation ("United") filed an application with the State Engineer for a permit to divert certain groundwater for use by HRI in drilling up to 750 wells on Sections 17 and 8. (R., Vol. III, No. 63, at 2.) The Navajo Nation opposed United's permit application, arguing that the State Engineer did not have jurisdiction over the proposed diversion points because Sections 17 and 8 are within Indian country and because United had failed to make the required showings for the permit to be granted. (R., Vol. III, No. 62.) On February 13, 1992, the State Engineer adopted a Hearing Examiner's report and recommendations that found without explanation that the State Engineer had jurisdiction over the application but denied the permit application because United had failed to show that it had sufficient water rights to support the diversion application. (R., Vol. III, No. 63.)

United appealed the State Engineer's decision to the Eleventh Judicial District Court for the County of McKinley, New Mexico. The Navajo Nation was listed as an "appellee" in the state court proceeding and filed briefs renewing its jurisdictional objections. On October 19, 1995, the court granted summary judgment to the State Engineer, dismissing the appeal of United. The court also denied the Navajo Nation's motion to dismiss, finding, again without explanation, that Sections 17 and 8 were not Indian country. (R., Vol. IV, No. 69; NMED's Addenda to Brief, No. 15.)

Both United and the Navajo Nation appealed this ruling. Thereafter, United filed a motion seeking to have its cross-appeal voluntarily dismissed. In a Calendar Notice, (see NMED Docketing Statement, No. 12), the New Mexico Court of Appeals granted United's motion

voluntarily dismissing its appeal. At the same time, the court proposed to dismiss the Navajo Nation's appeal on grounds of mootness. It reasoned that there was no "actual controversy" for the court to consider, since (1) United had been denied its permit, (2) its appeal to the state court had been dismissed, and (3) United had voluntarily dismissed its appeal. (NMED Docketing Statement, No. 12.) The Navajo Nation did not respond to the Calendar Notice, and its cross-appeal was therefore dismissed as moot. (NMED Addendum, No. 17.)

STANDARD OF REVIEW

EPA's determination that Section 17 is Indian country and its determination that Section 8 is disputed Indian country may be reversed only if those decisions were arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. § 706(a)(2). The scope of review under this standard is narrow, and a court may not substitute its judgment for that of the agency. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983). Rather, the Court must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment. Id.

SUMMARY OF ARGUMENT

The petitions for review are, for a host of reasons, fatally flawed and must be denied. First, the petitions must be dismissed as untimely insofar as Section 17 is concerned. EPA has held since November 1993, and has consistently informed Petitioners since that time, that Section 17 is Indian country. The SDWA requires that petitions for review of final agency action be filed within 45 days of the action as to which review is sought, unless the petition is based solely on events occurring later. Petitioners have identified no such events, and their petitions must therefore be dismissed.

Second, even if it determines that the petitions are not untimely, this Court should affirm EPA's determination that Section 17 is Indian country under 18 U.S.C. § 1151(a). Section 17 was purchased with funds specifically appropriated by Congress for use in acquiring lands to be held in trust for the Navajo Nation, and Section 17 is, according to the deed under which it was purchased, held in trust by the United States for the use of the Navajo Nation. As such, Section 17 qualifies as a reservation pursuant to 18 U.S.C. § 1151(a), and EPA therefore retains primacy for purposes of the SDWA's UIC program.

Third, EPA's determination that the status of Section 18 as a "dependent Indian community" under 18 U.S.C. § 1151(b) is in dispute should be remanded to the Agency for further consideration in light of the Supreme Court's recent opinion in Venetie, so that the Agency may develop an appropriate and complete record and consider the status of Section 8 under the standards set forth in that case.

ARGUMENT

I. SECTION 17 IS INDIAN COUNTRY OVER WHICH EPA RETAINS UIC PRIMACY UNDER THE SDWA.

A. HRI and NMED Are Time-barred from Challenging EPA's Determination That Section 17 Is Indian Country.

The SDWA allows the filing of petitions, such as the two presently before this Court, for review of "action[s] of the Administrator under this Chapter," 42 U.S.C. § 300j-7(a)(2), but only during a very short window: the petition must be filed within 45 days of the "date of the determination with respect to which review is sought, and may be filed after the expiration of such 45-day period if the petition is based solely on grounds arising after the expiration of such

period." 42 U.S.C. § 300j-7(a).[17] In the present case, the determination with respect to which review is sought — namely, EPA's determination that Section 17 is "Indian land" within the meaning of 40 C.F.R. § 144.3 and that HRI must apply to EPA for any UIC permit covering Section 17 — was made in late 1993. The present petitions for review were not filed for another four years and are therefore time-barred under the SDWA.

In September 1992, HRI applied to NMED to amend an existing state UIC permit (DP-558) covering HRI's operations on Section 8, to include operations that HRI proposed to undertake on Section 17. (R., Vol. I, No. 1.) As no aquifer exemption had been approved for the aquifer underlying this parcel, on April 7, 1993, NMED wrote to EPA Region 6 seeking EPA's

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[17] The judicial review provision of the SDWA states, in relevant part:

> A petition for review of —
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> . . . .
>
> (2) any other action of the Administrator [i.e., actions other than those pertaining to the establishment of national primary drinking water regulations] under this chapter may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action.
>
> Any such petition shall be filed within the 45-day period beginning on the date of the promulgation of the regulation or any other final Agency action with respect to which review is sought or on the date of the determination with respect to which review is sought, and may be filed after the expiration of such 45-day period if the petition is based solely on grounds arising after the expiration of such period. Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or in any civil action to enjoin enforcement.

42 U.S.C. § 300j-7(a).

approval, pursuant to the 40 C.F.R. § 144.7(b)(2) and the Memorandum of Agreement between EPA and New Mexico, of a temporary aquifer designation covering the proposed extension of HRI's mining operations into Section 17. (R., Vol. I, No. 3; see also R., Vol. I, No. 19 at 1.)

On November 23, 1993, in response to NMED's request for approval of the temporary aquifer designation extension into Section 17, EPA sent a letter to the Director of the Water and Waste Management Division of NMED informing her that Section 17 is Indian land and that HRI must therefore apply to EPA for any UIC permit covering that land. (R., Vol. I, No. 14.) More specifically, the letter states:

> Based on our review of available information, all of Section 17, Township 16 North, Range 16 West (excluding minerals) is held in trust by the United States for the Navajo Nation. Land held in trust for an Indian tribe is part of "Indian Country" (18 U.S.C. § 1151) and, therefore, meets the definition of "Indian lands" (40 C.F.R. § 144.3). Our determination is that an extensive amount of Indian land is involved in HRI's proposed operations, and because of disputes over this land it may be prudent for EPA to oversee these lands as stated in 40 C.F.R. § 147.1603 and 53 Federal Register 43097(IV)(B), of October 25, 1988. It is our conclusion that HRI should submit its permit application to EPA. We plan to notify HRI in the near future of our decision.

(R., Vol. I, No. 14.) HRI was notified of EPA's decision regarding the Indian land status of Section 17 by letter dated December 29, 1993. (R., Vol. I, No. 15.) EPA's disapproval of the temporary aquifer designation extension was "final agency action for the purposes of judicial review." 40 C.F.R. § 144.7(b)(3).

Since that time, EPA has not wavered from its November 23, 1993, determination that Section 17 is Indian country and that HRI must submit a permit application to EPA Region 9. In fact, EPA informed both NMED and HRI on numerous occasions after November 23, 1993, that the Agency's determination as to the Indian country status of Section 17 remained unchanged,

that Section 17 is Indian country, and that Section 17 is therefore subject to the federal UIC program. (See R., Vol. I, Nos. 17, 20, 24, 27, 28, 31, 44, 46, 48.) For example, in October 1994, EPA reminded HRI that because Section 17 is Indian country, HRI must obtain its permit and aquifer exemption from EPA Region 9. (R., Vol. I, No. 17.) In August 1995, after NMED resubmitted the temporary aquifer designation request to EPA Region 6, EPA again disapproved the request because it had previously determined that Section 17 is Indian country and therefore subject to the federal UIC program. (R., Vol. I, Nos. 19, 20.)[18/] Later, in a March 1996 letter from the EPA Region 6 Regional Administrator and General Counsel responding to a NMED suggestion that EPA and NMED agree to some kind of "joint permitting" for HRI's project, EPA reiterated that, as discussed "in previous communications from EPA over the last two years, HRI must still submit a permit application (which would include an aquifer exemption request) under the [SDWA] to Region 9" because "Region 9 is the lead within EPA for all matters on Navajo lands . . . ." (R., Vol. I, Nos. 27 at 1, 2; see also R., Vol. I, No. 26.) In short, EPA's determination that Section 17 is Indian country has been reviewable since, at the very latest, December 29, 1993.

Congress, in adopting section 300j-7(b) and other similar statutes providing for limited review periods, "struck a careful balance between the need for administrative finality and the need to provide for subsequent review in the event of unexpected difficulties." National Mining Ass'n v. United States Dep't of Interior, 70 F.3d 1345, 1350 & n.2 (D.C. Cir. 1995). See also Mesa Airlines v. United States, 951 F.2d 1186, 1187 (10th Cir. 1991) (statutorily-imposed time

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[18/] EPA notes that this disapproval would also constitute final agency action for purposes of judicial review under 40 C.F.R. § 144.7(b)(3).

limits for initiating review of administrative actions are jurisdictional, not discretionary); Selco Supply Co. v. EPA, 632 F.2d 863, 864 (10th Cir.1980) (sixty-day limitation on time for appealing EPA order is a jurisdictional limitation). Allowing late review "based on grounds clearly available within" the statutorily-mandated period "would thwart Congress' well-laid plan." National Mining, 70 F.3d at 1350.

Here, the grounds for review — EPA's determination that Section 17 is Indian land — were "clearly available" no later than December 29, 1993, when EPA informed HRI that it must apply to EPA for a UIC permit. Accordingly, HRI and NMED's petitions as to Section 17 should have been filed, at the latest, by February 11, 1994, forty-five days after EPA's letter to HRI.

To the extent that Petitioners urge that a later filing of their petitions was justified by NMED's subsequent determination that Section 17 is not, in its opinion, "Indian country" within the meaning of 18 U.S.C. § 1151, or by a state court's similar ruling in United Nuclear Corporation v. Martinez, No. 92-72 (Eleventh Circuit District Court, McKinley County, New Mexico Oct. 15, 1995), suffice it to say that the last substantive ruling in any of those matters was issued on October 15, 1995. (See NMED Add., No. 15.) Thus, even assuming, arguendo, that these rulings constitute "grounds arising after the expiration" of the 45-day period and that HRI's and NMED's petitions were "based solely" on these later rulings within the meaning of 42 U.S.C. § 300j-7(a), the petitions nonetheless should have been filed no later than forty-five days after EPA reconfirmed to NMED, by letter of March 4, 1996, EPA's determination that Section 17 is Indian land. (R., Vol. I., No. 27.)

Likewise, as noted previously, the correspondence from EPA since 1993, (see R., Vol. I, Nos. 17, 20, 24, 27, 28, 31, 44, 46, 48), shows that EPA never undertook to "reexamine its former choice" as to the Indian country status of Section 17. Rather, EPA consistently took the position that the status of Section 17 as Indian land had been determined conclusively in 1993. (See, e.g., R., Vol. I, No. 17 (in "follow up to the letter dated December 29, 1993," EPA again informs HRI that "Section 17 meets the definition of 'Indian lands' set forth in 40 C.F.R. § 144.3"); R., Vol. I, No. 20 ("Region 6 concluded later in a letter to NMED dated November 23, 1993 that Section 17 is located within 'Indian Country' as defined under 18 U.S.C. § 1151 and therefore under federal jurisdiction")). Thus, the "reopener doctrine," which allows judicial review after the expiration of the statutory review period "where an agency has — either explicitly or implicitly — undertaken to 'reexamine its former choice,' " National Mining, 70 F.3d at 1351 (quoting Public Citizen v. Nuclear Regulatory Comm'n, 901 F.2d 147, 151 (D.C. Cir. 1990)), is not applicable here and does not excuse Petitioners' failure to raise this issue years ago.

Thus, insofar as the petitions relate to Section 17, they must be dismissed as untimely filed.

B. Section 17 Is Indian Country.

Even if this Court found that the petitions as to Section 17 were timely, the petitions[19/] must be denied and EPA's determinations affirmed, because Section 17 plainly falls within the

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19/ Although HRI, in its Petition for Review, makes reference to both Section 17 and Section 8, in its brief HRI focuses exclusively on Section 8. Section 17 is never mentioned in HRI's brief, and no relief with respect to Section 17 is sought therein. EPA therefore assumes that, to the extent HRI ever intended to challenge EPA's determination that Section 17 is "Indian land," that challenge has been withdrawn.

definition of "Indian lands" and thus remains within the primary jurisdiction of EPA. NMED contends in its brief that the Indian country status of Section 17 has already been determined adversely to EPA and the Navajo Nation by NMED itself and by two New Mexico courts. EPA was not a party to either of those proceedings, however, and cannot be bound by them, particularly in light of the federal government's trust obligations to the Navajo Nation.

1. Section 17 Is "Indian Land" within the Meaning of EPA's Regulations.

Even were HRI's and NMED's petitions timely filed, those petitions would fail insofar as Section 17 is concerned, because Congress authorized the purchase of Section 17, as well as the purchase of other land, by the United States to be held in trust for the benefit and use of the Navajo Nation. Under well-settled law, because Section 17 was purchased pursuant to an appropriation intended for the specific purpose of acquiring lands to be held in trust for the Navajo Nation and because the United States does in fact hold Section 17 in trust, Section 17 is Indian country as defined under 18 U.S.C. § 1151(a) and is therefore "Indian land" within the meaning of EPA's regulations. See discussion supra p. 7. EPA therefore retains primary UIC permitting responsibility over Section 17.

The parties agree on the test this Court must apply in determining whether Section 17 is Indian country and thus whether EPA retains primacy over UIC permits covering such land. "[T]he test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, [one must] ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' " Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 511 (1991) (quoting United States v. John, 437 U.S. 634, 648-49 (1978)). Land that has

been so set apart "qualifies as a reservation for tribal immunity purposes." Id. (quoting John, 437 U.S. at 649). See also United States v. McGowan, 302 U.S. 535, 539 (1938) ("colony" created by Congress as settlement for Indians was "reservation" because it was validly set apart for the use of the Indians, under the superintendence of the government; use of term "reservation" was not necessary).

In making this determination, congressional intent is the touchstone. John, 437 U.S. at 649-50; McGowan, 302 U.S. at 537-38. Accord, F. Cohen, Handbook of Federal Indian Law 41 (1982 ed.) ("[r]ecognition or establishment of lands as Indian country, a reservation, a dependent Indian community, or an allotment is essentially a matter of the purpose of Congress and of the Executive Department in negotiating treaties and agreements, enacting and carrying out statutes, and issuing executive orders").

With respect to Section 17, that congressional intent is manifest from the facts surrounding the land's acquisition by the United States. Section 17 was conveyed to the United States in June 1929 by deed from its previous owner, the Santa Fe Pacific Railroad Company. (Exh. K to R., Vol. III, No. 65.) The deed expressly conveys Section 17 from Santa Fe to "the UNITED STATES OF AMERICA, IN TRUST FOR THE NAVAJO TRIBE." (Exh. K to R., Vol. III, No. 65, at 2 (capitalization in original).) In the deed, Santa Fe reserved to itself the mineral rights underlying Section 17 and a surface easement to allow it to mine those minerals. (Exh. K to R., Vol. III, No. 65, at 5.) These mineral rights are now owned by HRI.[20/]

20/ NMED suggests in its brief that the Indian country status of split estates is an open question. (NMED Br. at 38.) It is not. EPA specifically addressed the issue of split estates in 1988 in the course of promulgating its regulations governing UIC programs for Navajo and other Indian country in New Mexico. See 40 C.F.R. Part 147. In the preamble to those regulations, (continued...)

There is ample evidence in the record that the purchase of Section 17 was effected using funds specifically appropriated by Congress in the Second Deficiency Act of 1928 (the "1928 Act"), ch. 853, 45 Stat. 883, 899-900 (1928), for the purchase of property by the United States "in trust for the Navajo Nation." The 1928 Act provides, in relevant part:

> For purchase of additional land and water rights for the use and benefit of Indians of the Navajo Tribe (at a total cost not to exceed $1,200,000, which is hereby authorized), title to which shall be taken in the name of the United States in trust for the Navajo Tribe, fiscal years 1928 and 1929, $200,000, payable from funds on deposit in the Treasury of the United States to the credit of the Navajo Tribe: Provided, That in purchasing such lands title may be taken, in the discretion of the Secretary of the Interior, for the surface only.

Id. Correspondence and memoranda written prior to the passage of the 1928 Act indicate that it was the federal government's intent to acquire Santa Fe's land, including Section 17, for the Navajo Tribe using congressionally-appropriated funds. For instance, in a letter dated November 8, 1926, S.F. Stacher, the Superintendent of the Department of the Interior's Pueblo Bonito Agency recommended that:

> 40 to 50 townships of Railroad lands be purchased from the Santa Fe R.R. Company . . . at a price of $1. to $2 per acre and include such land as is now urgent for the Navahos [sic] in Canoncito country under Southern Pueblo Agency. This will require an appropriation of $750,000. but in our opinion we are justified in asking for this amount.

20/ (...continued)
EPA states that "[i]f ownership of mineral rights and the surface estate is split, and either is considered Indian lands, the Federal EPA will regulate the well under the Indian land program." 53 Fed. Reg. at 43,098. Moreover, in P&M II, this Court faced a similar split estate issue and held that a coal mine was Indian country under 18 U.S.C. § 1151(c) even though the subsurface coal estate underlying the allotted lands at issue was owned by parties other than the allottees. 52 F.3d at 1542. Thus, the fact that the mineral estate underlying Section 17 is privately-owned is irrelevant to the question of whether Section 17 is Indian country.

R., Vol. III, No. 65, Exh. A, at 3. Mr. Stacher's letter was later cited by the Secretary of the Interior in an undated letter to Rep. Scott Leavitt, the chairman of the House Committee on Indian Affairs, as justification for passage of H.R. 16346, "a Bill 'to authorize the purchase of land for the Navajo Indians in Arizona and New Mexico.' " (R., Vol. III, No. 65, Exh. B, at 1, 3. See also R., Vol. III, No. 65, Exh. C, at 1-2; R., Vol. III, No. 65, Exh. G.) Following the purchase of the Santa Fe land, E.C. Finney, a solicitor for the Department of the Interior, opined at the request of the Commissioner of Indian Affairs as to the quality of title and sufficiency of the deeds pursuant to which the Santa Fe lands, including Section 17, were purchased. In the course of that opinion, Mr. Finney stated, "The consideration is $1 an acre, a total of $94, 233.08, and is to be paid from tribal funds belonging to the Navajo Indians pursuant to an appropriation carried by the act of May 9, 1928 (45 Stat. 883, 899-900) [i.e., the 1928 Act]." (R., Vol. III, No. 65, Exh. L, at 1.) Finally, the deed, as already noted, uses the language of the 1928 Act, providing that the land is acquired in the name of the United States of America, in trust for the Navajo tribe. (Exh. K to R., Vol. III, No. 65.)

The federal courts — from the Supreme Court to this Court to the District Courts — have repeatedly held that such lands acquired under such circumstances are "reservations" for purposes of § 1151(a). In John, for example, the Supreme Court considered the "Indian country" status of lands purchased pursuant to federal appropriations for the Choctaw Indians residing in Mississippi. Originally, the lands purchased pursuant to these appropriations were sold on contract to individual Choctaw Indians. 437 U.S. at 645. In 1939, however, "Congress passed an Act providing essentially that title to all the lands previously purchased for the Mississippi Choctaws would be 'in the United States in trust for such Choctaw Indians of one-half or more

Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior.' " John, 437 U.S. at 646 (quoting Ch. 235, 53 Stat. 851 (1939)). Five years later, in December 1944, the Assistant Secretary of the Interior officially proclaimed these lands to be a reservation. 437 U.S. at 646 (citing 9 Fed. Reg. 14907).

The question before the Supreme Court was whether these lands constituted a "reservation" under section 1151(a). 437 U.S. at 648.[21/] The Court found that they did. Although it found that "any doubt about the matter" was resolved by the 1944 proclamation, the lands attained reservation status in 1939, when Congress declared them held in trust by the United States. The Court stated:

> The Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were at that time under federal supervision. There is no apparent reason why these lands, which had been purchased in previous years for the aid of those Indians, did not become a "reservation," at least for the purposes of federal criminal jurisdiction [under 18 U.S.C. § 1151] at that particular time.

21/ The Court stated:

> With certain exceptions not pertinent here, § 1151 includes within the term "Indian country" three categories of land. The first, with which we are here concerned, is "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent."

437 U.S. at 648 (footnote omitted). In a footnote, the Supreme Court suggested that the three categories were not mutually exclusive, that land that qualified as "reservation" under section 1151(a) might also qualify as a "dependent Indian community" under section 1151(b) or as an "allotment" under section 1151(c). 437 U.S. at 648 n.17. The Court ultimately did not reach this issue, though. It stated, "Inasmuch as we find in the first category a sufficient basis for the exercise of federal jurisdiction in this case, we need not consider the second and third categories." Id.

437 U.S. at 649. Thus, the fact that Congress chose to hold the lands in trust for the benefit of the tribe was sufficient to render those lands "reservation" for purposes of section 1151(a), even though Congress never formally designated those lands as "reservation."

Similarly, in Potawatomi, the Supreme Court held that tribal trust land — that is, land that has not been formally designated as a "reservation" but that is held in trust for an Indian tribe by the federal government — "is 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes." Potawatomi, 498 U.S. at 511 (citing John, 437 U.S. at 649).[22/] See also Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993) ("Congress has defined

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22/ NMED suggests that Potawatomi held that "[t]he fact that Congress authorized title to be purchased in trust . . . does not automatically equate to congressional intent that the unspecified lands be the equivalent to a 'reservation.' " (NMED Br. at 41.) To support this suggestion, NMED quotes Potawatomi as holding that "whether land constitutes a reservation 'does not turn on whether Congress denominated the lands as trust lands.' " (NMED Br. at 41 (quoting Potawatomi, 498 U.S. at 511 (emphasis added by NMED))). Even a cursory examination of Potawatomi shows, however, that NMED quoted only part of a sentence and took that sentence out of context in order to find some shred of support for its position. In fact, the Court in Potawatomi said:

> . . . Oklahoma argues that the tribal convenience store should be held subject to state tax laws because it does not operate on a formally designated "reservation," but on land held in trust for the Potawatomis. Neither [Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)] nor any other precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. In United States v. John, 437 U.S. 634 . . . (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been " 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' " Id., at 648-49 . . .; see also United States v. McGowan, 302 U.S. 535, 539 . . . (1938).

498 U.S. at 511. The Court then held that because the property in question was held by the federal government in trust for the Potawatomis, it had been validly set apart and qualified as "reservation." Id. Thus, Potawatomi in fact stands for a proposition that is precisely the opposite of what NMED posits: lands that Congress has denominated as "trust lands" are the equivalent of "reservations" under section 1151(a), even though Congress did not call them "reservations."

Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.") (emphasis added).

In McGowan, a case decided prior to the enactment of 18 U.S.C. § 1151[23/] but nonetheless helpful here, the Supreme Court held that land purchased in 1916 for the Reno Indian Colony under an appropriation act nearly identical to the 1928 Act qualified as a "reservation" under a statute which provided for forfeiture of automobiles used to carry intoxicants into Indian country. McGowan, 302 U.S. at 537-39. One of the appropriations acts at issue in McGowan provided, in relevant part:

> For the purpose of procuring home and farm sites, with adequate water rights, and providing agricultural equipment and instruction and other necessary supplies for the nonreservation Indians in the State of Nevada, $15,000. * * *
>
> For the purchase of land and water rights for the Washoe Tribe of Indians, the title to which is to be held in the United States for the benefit of said Indians, $10,000, to be immediately available; for the support and civilization of said Indians, $5,000; in all, $15,000.

Act of May 18, 1916, ch. 125, 39 Stat. 123, 143 (quoted in McGowan, 302 U.S. at 537 n.4). The Supreme Court held that the land purchased pursuant to this Act was validly set apart for the use of the Indians, that the land was under the superintendence of the government, and that it therefore was equivalent to a reservation and thus "Indian country." McGowan, 302 U.S. at 539. The 1928 Act, pursuant to which Section 17 was purchased, being nearly identical to the appropriations act at issue in McGowan, is a similarly clear expression of congressional intent

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23/ The Reviser's Notes to section 1151 indicates that the standard set forth in section 1151(a) was based on several decisions of the Supreme Court, including McGowan. John 437 U.S. at 648.

that Section 17 qualifies as a reservation and is thus "Indian country" under 18 U.S.C. § 1151(a).[24/]

A number of appellate courts, including this Court, have also held that lands held in trust by the federal government for the benefit of Indian tribes are "reservations" under section 1151(a). NMED simply ignores these cases. In Cheyenne-Arapaho Tribes of Okla. v. Oklahoma, 618 F.2d 665, 668 (10th Cir. 1980), for example, this Court held that various lands acquired and held in trust by the United States for the Cheyenne-Arapaho tribes were "Indian Country within the meaning of § 1151(a)." Some of these lands had been acquired under the Oklahoma Indian Welfare Act of 1936, ch. 831, 49 Stat. 1967, 25 U.S.C. §§ 501 et seq., and later declared to have reservation status by the Solicitor for the Department of the Interior; some,

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24/ NMED suggests that all the cases, including McGowan, upon which EPA relied in finding the requisite congressional intent in the 1928 Act involved "explicit evidence of Congressional intent to set aside specific lands for the occupation and use of an Indian tribe . . . ." (NMED Br. at 45.) Insofar as McGowan is concerned, NMED appears not to have read the statute there at issue. Attempting to distinguish McGowan from the facts of the present case, NMED suggests that, unlike in the present case, the 1916 Act specifically "authorized the federal government to purchase 20 acres in trust . . . ." (NMED Br. at 44.) Examination of the 1916 Act shows, however, that there is no specification of lands to be purchased or even of the amount of acreage to be purchased. 39 Stat. at 143. Rather, the 1916 Act, like the 1928 Act pursuant to which Section 17 was purchased, simply specifies that certain sums of money were appropriated for the purchase of lands to be held in trust for the benefit of the Indian tribe. Id. NMED's confusion appears to result from the Supreme Court's — not the statute's — statements that 20 acres of land were purchased by the United States "under the authority of" the 1916 Act and that "additional appropriation was made" in 1926 for the purchase of more lands "[o]n recommendation of the Secretary of the Interior." McGowan, 302 U.S. at 537 n.4. Similarly, in Langley v. Ryder, 778 F.2d 1092, 1094-95 (5th Cir. 1985), and Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 665-66 (9th Cir. 1975), lands acquired by the United States in trust pursuant to general, rather than specific, authorizations were held to be Indian country. Thus, there is simply no support for NMED's contention that congressional intent must be expressed in a statute that specifies the lands to be purchased. It is enough that Congress authorized the acquisition of lands to be held in trust for the benefit of a tribe and that those lands were acquired with funds appropriated for that purpose.

though by no means all, of these lands were covered by the Act of January 29, 1942, ch. 26, 56 Stat. 21 (1942), which "declares that land held in trust by the United States for the Tribes is 'subject to all provisions of existing law applicable generally to Indian reservations.' " Cheyenne-Arapaho, 618 F.2d at 667-68. This Court made no distinction between the lands that were acquired pursuant to the Oklahoma Indian Welfare Act and those that were, pursuant to the 1942 Act, made subject to laws applicable to reservations. Rather, it held, "We are convinced that, barring possible specific exceptions to which our attention is not directed, lands held in trust by the United States for the Tribes are Indian Country within the meaning of § 1151(a)." Id. at 668. See also United States v. Azure, 801 F.2d 336, 339 (8th Cir. 1986) (land held in trust by United States for Indian tribe, "although not within the boundaries of the Turtle Mountain Reservation, can be classified as a de facto reservation, at least for purposes of federal criminal jurisdiction"); Langley v. Ryder, 778 F.2d 1092, 1095 (5th Cir. 1985) ("whether the lands are merely held in trust for the Indians or whether the lands have officially been proclaimed a reservation, the lands are clearly Indian country"); Santa Rosa Band of Indians, 532 F.2d at 665-66 (lands were subject to exclusive federal regulation where they were purchased pursuant to statute that authorized Secretary of Interior to purchase lands for "purpose of providing land for Indians" and to take title to such lands in trust).

2. The "Disestablishment" of the EO709/744 Area Is Irrelevant to the Indian Country Status of Section 17.

NMED, relying on an erroneous and overbroad reading of this Court's ruling in P&M I, urges a contrary conclusion. NMED argues that Section 17 cannot be "Indian country" under 18 U.S.C. § 1151(a) because the area of New Mexico in which Section 17 is located — commonly

referred to as the "EO709/744 area"[25] — was "divested of all reservation status by statute and executive orders issued in 1908 and 1911." (NMED Br. at 39.) NMED suggests that, under P&M I, Section 17 cannot be section 1151(a) "Indian country" — that is, land which is "Indian country" because it qualifies as a "reservation" — because of the cancellation of the EO709/744 area's reservation status. (NMED Br. at 38-40.)

P&M I simply cannot be read as standing for such a broad proposition as NMED posits,[26] and EPA's determination that Section 17 is "Indian country" under section 1151(a) is in fact entirely consistent with P&M I. In P&M I, the Navajo Nation sought to have this Court declare that the entire EO709/744 area was still part of the Navajo Reservation, despite the evidence of Executive Orders 1000 and 1284 that the reservation status of that area had been canceled. In support of its contention that the entire EO709/744 area remained "Indian country" even after the executive orders, the Navajo Nation offered evidence of congressional appropriations for water development between 1919 and 1927 that referred in some way to "the Pueblo Bonito 'Reservation' or 'subdivision of the Navajo Reservation.' " 909 F.2d at 1418. In rejecting these appropriations as evidence of a congressional understanding that the entire EO709/744 area remained "reservation" despite the disestablishment of the formal reservation, the Court noted that, since "Congress was appropriating much needed money for water development throughout the entire Navajo area . . . and was appropriating one lump sum of money that could be used

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[25] See discussion supra pp. 11-12.

[26] Indeed, NMED's position is contrary to this Court's decision in Mustang Prod. Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996), cert. denied, 117 S. Ct. 1288 (1997), in which this Court held that "disestablishment of the reservation is not dispositive of the question of tribal jurisdiction. In order to determine whether the Tribes have jurisdiction we must instead look to whether the land in question is Indian country." Id. at 1385 (citations omitted).

anywhere within" any of five subdivisions — Navajo, Moqui, Pueblo Bonito, San Juan, and Western Navajo — in that Navajo area, the reference in those appropriations to "reservation" could well refer to particular subdivisions or parcels of land in which reservation status continued to exist or had been re-established. Id. As a consequence, the use of the term "reservation" in those appropriations "d[id] not show that Congress recognized the 709/744 area in New Mexico as maintaining reservation status." Id.[27/]

In the present case, on the other hand, as discussed pp. 28-29, there is undisputable evidence that Congress did intend that the lands to be purchased pursuant to the 1928 Act — lands which were, by the terms of that Act, to be purchased and held "in the name of the United States in trust for the Navajo Tribe" — be considered the equivalent of a reservation, in accordance with the Supreme Court's rulings in John, Potawatomi, Sac and Fox Nation, and McGowan. In short, EPA's determination that Section 17 is "Indian country," as evidenced by Congress' expressed intent in the 1928 Act to authorize the purchase of lands "in the name of the United States in trust for the Navajo Tribe" is entirely consistent with P&M I.[28/]

27/ NMED also cites United States v. Stands, 105 F.3d 1565, 1572 & n.3 (8th Cir.), cert. denied, 118 S. Ct. 120 (1997), for the proposition that, "[f]or jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country," but that "[i]n some circumstances, off-reservation tribal trust land may be considered Indian country." (See NMED Br. at 38.) What NMED overlooks is that the Eighth Circuit in Stands cited, as an example of the type of circumstances in which off-reservation land may be considered Indian country, the Azure case, discussed pp. 34, in which the Eighth Circuit held that lands held in trust for the benefit of a Tribe "could be considered de facto reservation or dependent Indian community[.]" Stands, 105 F.3d at 1572 n.3 (citing Azure, 801 F.2d at 338-39). It should also be noted that Stands did not involve tribal trust lands, but lands which were allotments and therefore Indian country under 18 U.S.C. § 1151(c).

28/ That lands within the 709/744 area that are held in trust by the federal government are still Indian country despite the disestablishment of the area's reservation status is also supported (continued...)

Section 17 is plainly "Indian country" within the meaning of 18 U.S.C. § 1151(a)[29] and is therefore, under 40 C.F.R. § 144.3, "Indian land" over which EPA retains UIC primacy, including the authority to issue SDWA permits.

3. The Decisions of the NMED and the New Mexico State Court, to Which EPA Was Not a Party, Do Not Estop EPA from Determining That Section 17 Is "Indian Country."

NMED's second argument — that EPA is collaterally estopped from concluding that Section 17 is "Indian country" by a NMED proceeding and a state court proceeding in which those tribunals held to the contrary — is plainly and fatally flawed: EPA was not a party to the

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[28] (...continued)
by this Court's opinion in Cheyenne-Arapaho. Like the lands at issue in the present case, the lands at issue in Cheyenne-Arapaho were within the boundaries of a congressionally "disestablished" Indian reservation. 618 F.2d at 667. Despite the disestablishment of that reservation, this Court held that "lands [within that disestablished reservation that are] held in trust by the United States for the Tribes are Indian Country within the meaning of § 1151(a)." Id. at 668. Were NMED's reading of P&M I correct, then this Court never should have ruled the lands held in trust for the Cheyenne-Arapaho Tribes to be Indian country.

[29] In its recent decision in Venetie, the Supreme Court makes no mention of its earlier rulings in John, Potawatomi, and Sac & Fox Nation. This should come as no surprise. While each of those earlier decisions involved lands that were Indian country under 18 U.S.C. § 1151(a) because they were the equivalent of "reservations," John, 437 U.S. at 648; Potawatomi, 498 U.S. at 511; Sac & Fox Nation, 508 U.S. at 121-22, Venetie marked the Supreme Court's first opportunity "to interpret the term 'dependent Indian communities' " under 18 U.S.C. § 1151(b). 1998 WL 75038, at *5. Thus, Venetie should not be read as overruling those cases sub silentio. If, however, for some reason, this Court does read Venetie as having affected the John, Potawatomi, and Sac and Fox Nation line of cases, then EPA, which did not analyze the status of Section 17 as a "dependent Indian community," is entitled to a remand so that it may consider the effect of the Venetie test on its analysis of Section 17. Waldau v. Merit Sys. Protection Bd., 19 F.3d 1395, 1401-02 (Fed. Cir. 1994) (remand to agency appropriate where new legal standard was announced); Tomas v. Rubin, 935 F.2d 1555 (9th Cir. 1987) (remand to agency appropriate in light of new legal standard not previously applied by agency); Morrison-Knudsen Co. v. CHG Int'l, Inc., 811 F.2d 1209, 1223 (9th Cir. 1987) (where new legal standard has been announced, remand to agency is appropriate in light of "agency's interest in applying its expertise, correcting its own errors, making a proper record, and maintaining an efficient, independent administrative system").

proceedings to which NMED refers and, under well-settled law, those proceedings therefore cannot bind EPA.

NMED correctly sets forth both the standard under which full faith and credit is accorded the decisions of the state tribunals and the test for collateral estoppel under New Mexico law. (NMED Br. at 19.) This Court is required to give the same preclusive effect to state court judgments that the state rendering the judgments would have given. See, e.g., Hawkins v. Commissioner of Internal Revenue, 86 F.3d 982, 986 (10th Cir. 1996). A New Mexico state court judgment will collaterally estop a party in a later federal proceeding when "(1) the parties are the same or are privies of the original parties; (2) the cause of action is different; (3) the issue or fact was actually litigated; and (4) the issue was necessarily determined." Hawkins, 86 F.3d at 987 (citations omitted).

What NMED does not, and indeed cannot, do is point to any evidence that EPA was a party to any of the proceedings to which NMED refers or any reason why EPA should otherwise be bound by the results of those proceedings. The proceedings are described at length in NMED's brief, (see NMED Br. at 7-11, 21-24), and elsewhere herein, see supra pp. 17-19, and need not be repeated in great detail here. One proceeding arose out of HRI's 1992 application to NMED for a modification of its state UIC permit to cover Section 17. (See NMED Br. at 7-10 and Record and Addendum Documents cited therein.) The other arose out of a water rights case involving Sections 8 and 17 pending before the State Engineer and later before the Eleventh Judicial District Court and the New Mexico Court of Appeals. (See NMED Br. at 10-11, 21-23 and Record and Addendum Documents cited therein.) The Navajo Nation entered appearances in both proceedings to challenge the state's jurisdiction on the grounds that the lands in question

were Indian country and thus not subject to state regulation. In both cases, the state tribunals rejected Navajo Nation's jurisdictional challenges, finding that Section 17 was not Indian country.[30/]

NMED's attempts to bind EPA to the rulings of the state tribunals — rulings which, as we showed previously herein, are plainly incorrect under the Supreme Court's rulings in John, Potawatomi, Sac & Fox Nation, and McGowan — fails because EPA was not a party or in privity with a party to any of the state proceedings.[31/] Indeed, NMED makes no such allegation. To the extent that NMED suggests that EPA should be bound by the erroneous rulings of the state tribunals because Navajo Nation was a party to those proceedings, that argument is

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30/ In neither proceeding did the tribunal appear to give any consideration to the 1928 Act pursuant to which Section 17 was purchased and whether that Act was evidence of congressional intent that Section 17 be set aside for the use of the Navajo Nation. See discussion supra pp. 17-19. While the Secretary of the NMED, in determining that Section 17 was not Indian country, correctly stated that congressional intent was critical in determining whether Section 17 had "reservation" status under 18 U.S.C. § 1151(a), she made no reference at all to the effect of the 1928 Act on her decision; indeed, it appears that neither she nor the hearing officer before her was aware of the Act's existence. (R., Vol. IV, No. 85, at 2-3.)

The decisions of the State Engineer and the Eleventh Judicial District Court contain no reasoning whatsoever. The State Engineer's decision states no more than that it "has jurisdiction of the parties and subject matter." (R., Vol. III, No. 63, at 1.) The Eleventh Judicial District Court held, without analysis, that Sections 8 and 17 "are not within the boundaries of the Navajo Nation nor are they Indian country." (R., Vol. III, No. 69.)

31/ In addition, NMED itself previously concluded, in the administrative rulings it here relies upon, that its own determinations as to the Indian country status of Section 17 were not binding on EPA. In her Decision Denying Navajo Nation's Motions to Dismiss and for Reconsideration, (R., Vol. IV, No. 85, at 9 n.5), NMED's Hearing Officer noted that, "[a]s HRI correctly emphasized, only a court of competent jurisdiction can decide the issue [of the state's and EPA's jurisdiction to administer their UIC programs on Section 17] in a manner binding on NMED or EPA." The Hearing Officer thus concluded that "[t]he jurisdiction of NMED to decide this permit application . . . is not governed by EPA's application of the definition of Indian lands in 40 C.F.R. § 144.3 to Sec. 17, nor by the decision of EPA whether to administer a UIC program on that land." Id.

baseless. The Supreme Court has held that the United States may not be bound by judgments rendered in other cases in which Indians or Indian tribes represented themselves without the direct involvement of the federal government. Drummond v. United States, 324 U.S. 316, 318 (1945); United States v. Candelaria, 271 U.S. 432, 444 (1926).[32]

In Drummond, the United States brought suit on behalf of an "incompetent" Osage Indian to cancel a mortgage on and quiet title to property owned by that Indian, despite the fact that an Oklahoma court had earlier held, in an action to which the United States was not a party, that the mortgage was valid and that foreclosure was appropriate. 324 U.S. at 317. The Secretary of the Interior had authorized the employment of the Indian's attorney in the earlier action and had even approved the attorney's fee. The mortgage holder asserted that, as a result of the Secretary's actions, the Oklahoma action was res judicata as to the United States' claim. The Supreme Court rejected this argument, holding that "to bind the United States when it is not formally a party, it must have a laboring oar in a controversy. This is not to be inferred merely because the Secretary of the Interior enables an incompetent Indian to protect his interests." 324 U.S. at 318.

Candelaria too was an action brought by the United States to quiet title to Indian lands. As in Drummond, the defendants urged that the United States' claims were barred by adverse decrees entered in two previous suits between the Indians and the defendants. 271 U.S. at 437-

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[32] While this rule derives primarily from the general principles applicable to res judicata and collateral estoppel — specifically, from the principle that, in order to be bound, a person must have been party to or in privity with a party to the previous proceeding — it also finds a basis in the trust obligations that the United States owes to the Indian tribes. United States v. Mason, 412 U.S. 391 (1973); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). Holding the federal government bound in this context by decisions to which it was not a party would violate the maxim that the United States' responsibilities to the Indians cannot be impaired without its consent. Candelaria, 271 U.S. at 443-44.

38. As in Drummond, the Supreme Court in Candelaria held that the previous judgments did not estop the United States from asserting its claim. It stated that where a previous judgment binding an Indian tribe " 'would be a violation of the governmental rights of the United States arising from its obligation to a dependent people, no stipulations, contracts, or judgments rendered in suits to which the government is a stranger, can affect its interests.' " Id. at 444. If, however, "the decree was rendered in a suit begun and prosecuted by [a special attorney hired and paid by the United States to represent the Indians and look after their interests], we think the United States is as effectively concluded as if it were a party to the suit." Id.

4. EPA's Determination that Section 17 Is Indian Country Was Entirely Consistent with Its Regulations.

NMED contends that EPA's independent determination as to Section 17's Indian country status is somehow contrary to the SDWA and the regulations promulgated thereunder. (See NMED Br. at 25-28.)[33/] Its argument is, however, baseless. NMED argues, without citation to any authority, that:

> [t]he SDWA and federal UIC rules do not confer upon USEPA authority to conduct an "additional" and "independent" review of the jurisdictional status of lands, based upon an alleged "claim" by the Navajo Nation where, as here, that "claim" is not pursuant to any regulatory process or authority and further directly conflicts with the outcomes of the administrative and judicial decisions.

33/ NMED suggests in its brief that the state rulings which "bar" EPA from considering the Indian country status of Section 17 were issued "prior" to EPA's determination that Section 17 is Indian country. (NMED Br. at 25.) To the contrary, EPA made its Section 17 determination in November 1993, (R., Vol. I, Nos. 14, 15), six months before the NMED Hearing Officer denied Navajo Nation's motion to dismiss the state UIC amendment proceeding on jurisdictional grounds, (R., Vol. IV, No. 85), and a year-and-a-half before the state court's ruling in United Nuclear v. Martinez, (R., Vol. III, No. 67).

(NMED Br. at 25-26 (emphasis in original).) Significantly, NMED concedes that EPA has an obligation independently to assess its jurisdiction when the question of jurisdiction "result[s] from a regulatory process," such as, for instance, when EPA is considering a UIC permit application or an application by an Indian tribe for treatment in the same manner as a state pursuant to 42 U.S.C. § 300j-11. (NMED Br. at 26.) Rather, it contends that this is not one of those circumstances. NMED states:

> The Navajo Nation's "claim" giving rise to USEPA's decision did not result from a regulatory process such as that established for USEPA review of TAS [Treatment as State] applications or permit application [sic] which, unlike this case, necessitate USEPA review of its jurisdiction, and additionally, provides all interested persons with the right to comment.

(Id. (emphasis in original).)

Contrary to NMED's assertion, however, EPA's determination that Section 17 is Indian country did arise in the course of the "regulatory process." Specifically, the question of Section 17's Indian country status arose when NMED itself applied for EPA approval of a temporary aquifer designation covering Section 17 — that is, for a temporary exemption of the aquifer underlying Section 17 from the SDWA's general prohibition against injecting into an underground source of drinking water. (See R., Vol. I, No. 3.) Under 40 C.F.R. § 144.7(b)(3), in order to be valid, such exemptions must be authorized by EPA as a revision to the state's approved UIC program. Western Neb. Resources Council v. EPA, 793 F.2d 194, 196 (8th Cir. 1986). New Mexico's approved UIC program does not, however, extend to Indian country. 40 C.F.R. § 147.1601.[34/] In short, given the express limitation on NMED's delegated authority and

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[34/] 40 C.F.R. § 147.1601 states, in relevant part:

(continued...)

in light of the federal government's general trust responsibilities to the Navajo Nation, once NMED submitted its temporary aquifer designation request to EPA for section 17, it was appropriate for EPA to consider the Indian country status of Section 17, whether or not the issue was raised by the Navajo Nation. Thus, NMED's contention that EPA could not, on its own, consider the Indian country status of Section 17 is meritless.

As there has been no suggestion in the present case that the United States participated as a party in any way in the state proceedings to which NMED points, EPA was not precluded by the rulings in those proceedings from determining that Section 17 is Indian country for the purposes of the SDWA.

II. EPA'S DETERMINATION THAT THE INDIAN COUNTRY STATUS OF SECTION 8 IS IN DISPUTE MUST BE REMANDED FOR CONSIDERATION BY THE AGENCY IN LIGHT OF VENETIE.

While EPA determined in 1993 that Section 17 is unquestionably Indian country, EPA has made no such determination as to the Indian country status of Section 8. Rather, EPA determined in July 1997 only that "a dispute exists regarding the Indian country status of Section 8 . . . ." (R., Vol. I, No. 48 at 2.) As a consequence, in accordance with its regulations governing UIC programs for Navajo and other Indian lands, see 53 Fed. Reg. at 43,097, EPA appropriately retained primary UIC permitting authority over Section 8 pending resolution of that dispute. (R., Vol. I, No. 48 at 2.) EPA's determination that a dispute existed as to Section 8

34/ (...continued)

The UIC program for Class I, III, IV, and V injection wells in the State of New Mexico, except for those on Indian lands, is the program administered by the New Mexico Water Quality Control Commission, the Environmental Improvement Division, and the Oil Conservation Division, approved by EPA pursuant to section 1422 of the SDWA [42 U.S.C. § 300h-1].

was based on a four-part test, adopted by this Court in P&M II, for measuring whether lands are part of a "dependent Indian community" under 18 U.S.C. § 1151(b).[35] (R., Vol. I, No. 48, Attachment A at 5.) Very recently, however, in Venetie, the Supreme Court rejected a similar six-part "balancing" test employed in the Ninth Circuit for determining whether lands are part of a "dependent Indian community" under section 1151(b), and this Court should thus remand EPA's earlier determination to the agency for its continued consideration, in light of Venetie.[36]

When EPA in 1988 issued its regulations governing UIC programs for Navajo and other Indian lands, it recognized that situations might arise in which parties would disagree about whether particular lands fell within the definition of "Indian lands" and thus were subject to regulation under that federal UIC program. "An Indian tribe would probably object to a State exercising jurisdiction over lands it perceives as Indian lands, and a State would object to an Indian Tribe exercising authority over lands which it believes to be non-Indian lands." 53 Fed. Reg. at 43,097. EPA was concerned that, in those situations where it could not readily resolve such disputes, underground injection activities might go unregulated because EPA could not determine which entity — the state or the Indian tribal government — was entitled to primacy.

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[35] 18 U.S.C. § 1151(b) states that "Indian country" includes "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State."

[36] As explained supra note 29, EPA's determination that Section 17 is Indian country pursuant to 18 U.S.C. § 1151(a), which governs lands that are reservations or the equivalents thereof, is unaffected by Venetie.

Id. EPA therefore determined that, pending the resolution of such jurisdictional disputes, it would "implement the Federal UIC program for disputed lands." Id. [37]

An intractable dispute of precisely the sort envisioned by EPA arose in the present case when the Navajo Nation notified EPA on October 21, 1996, that it considered Section 8 to be "Indian lands" within the meaning of EPA's regulations because those lands were part of a "dependent Indian community" as defined in 40 C.F.R. § 144.3. (R., Vol. I, No. 39 at 2-3.) In support of that contention, Navajo Nation submitted numerous exhibits demonstrating a "pattern of continuous Navajo use and occupancy of the lands surrounding Section 8, and demonstrat[ing] the exclusive nature of that use and occupancy since at least the turn of the century." (R., Vol. I, No. 39 at 2.) NMED countered, contending that Section 8 was not "Indian land" because (1) a state court had conclusively so determined and (2) EPA had earlier approved a temporary aquifer designation for Section 8 and added it to the state's primacy program, thus implicitly determining that Section 8 was not "Indian land." (R., Vol. I, Nos. 42 at 1-2.)[38]

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[37] The preamble to the regulations also states that "[i]f disputed territory is later adjudged to be non-Indian lands, it will be deleted from the EPA Direct Implementation Indian land program and added either to the EPA (non-Indian land) DI program for that State or to the State program, as appropriate." Id.

[38] EPA concluded for the reasons discussed supra pp. 37-41 — namely, because EPA was not a party to the state court proceeding in which the issue of Section 8's "Indian land" status was allegedly resolved and because EPA has an independent responsibility to examine the "Indian land" status of Section 8 — that it could not be bound by the state court's rulings regarding Section 8. (R., Vol. I, No. 48, Attachment at 6.)

As to its earlier approval of an aquifer exemption for Section 8, the Indian country status of that land was not raised by any party and was not considered by EPA in the course of that proceeding. Once EPA determined, however, that there was a question as to the Indian country status of Section 8, it appropriately exercised UIC primacy over that land lest it turn out that NMED was exercising primacy over that Indian land without an approved program for so doing.
(continued...)

At the time this dispute between Navajo Nation and NMED was presented to EPA, the test in this Circuit for determining whether lands were part of a "dependent Indian community" was the four-part test set forth in P&M II. In P&M II, this Court held that, in determining whether an area was within a dependent Indian community, a court or agency must consider:

> "(1) whether the United States has retained 'title to the lands which it permits the Indian to occupy' and 'authority to enact regulations and protective laws respecting this territory,'; (2) 'the nature of the area in question, the relationship of the inhabitants in the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area,'; (3) whether there is 'an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality,'; and (4) 'whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples.' "

52 F.3d at 1545 (quoting United States v. South Dakota, 665 F.2d 837, 839 (8th Cir. 1981) (citations omitted)).

Applying this test to the facts and arguments presented by Navajo Nation and NMED, EPA concluded that it:

> [did] not have enough information to make a final determination on many of the factors in the [P&M II] test at this time. For example, although Section 8 is privately owned (by HRI), title to a majority of the land in the Church Rock area is held in trust by the U.S. for the Navajo Nation or members of the Tribe.

38/ (...continued)

While NMED contends in its brief that EPA's July 14, 1997, letter was insufficient to rescind EPA's 1989 approval of an aquifer exemption for Section 8 to New Mexico, EPA's regulations show that the letter was in fact all that was needed. Those regulations provide that, while "substantial revisions" to a state UIC program may be accomplished only after public notice, an opportunity to comment, and publication of the revision in the Federal Register, "non-substantial program revisions" may be accomplished simply by "a letter from [EPA] to the State Governor or his designee." 40 C.F.R. § 145.32(b)(2), (b)(4). As NMED's own brief and exhibits suggest (see NMED Addendum, No. 9), the temporary aquifer designation for Section 8 was accomplished by letter from EPA to NMED, thus indicating that it was a "non-substantial" program revision. See Western Neb. Resources Council, 793 F.2d at 199-200. Thus, EPA could, and did, properly withdraw the state's jurisdiction over Section 8 in the same manner.

> Moreover, while the State of New Mexico provides some governmental services (roads, schools), the federal and Tribal governments provide most services to the people at Church Rock because they are Native Americans. And while the community is overwhelmingly Navajo, there are some non-Indian interests also. Finally, it could be argued that the actions of the federal government over the last 90 years indicates that the area around HRI's proposed project at Church Rock has been set apart for the Navajo Indians. However, at this point it is unclear whether privately-owned land would be considered part of the Indian community or that the federal government's actions affected the private land's status.

(R., Vol. I, No. 48, Attachment at 5.) EPA therefore concluded "that the Indian country status of Section 8 is in dispute." (Id.)

In its recent opinion in Venetie, however, the Supreme Court rejected the nearly identical test for dependent Indian communities applied in the Ninth Circuit.[39/] It held that the term "dependent Indian communities" as it is used in 18 U.S.C. § 1151(b) "refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements — first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." 1998 WL 75038, at *5.

EPA has not had an opportunity to consider whether Section 8 is part of a "dependent Indian community" after Venetie, and it did not develop a record below with the Venetie standard in mind. In such cases, the appropriate course is to remand the matter to the agency so

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39/ The Ninth Circuit employed a six-factor "textured" balancing test which looked to:

> "(1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; (3) the established practice of goverenment agencies toward that area; (4) the degree of federal ownership of and control over the area; (5) the degree of cohesiveness of the area inhabitants; and (6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples."

Venetie, 1998 WL 75038, at *4 (quoting Alaska v. Native Village of Venetie Tribal Government, 101 F.3d 1286, 1300-01 (9th Cir. 1996), rev'd, 1998 WL 75038 (Feb. 25, 1998)).

that it may reconsider its ruling in light of the new standard. Waldau, 19 F.3d at 1401-02 (remand to agency appropriate where new legal standard was announced); Tomas, 935 F.2d at 1555 (remand to agency appropriate in light of new legal standard not previously applied by agency); Morrison-Knudsen, 811 F.2d at 1223 (where new legal standard has been announced, remand to agency is appropriate in light of "agency's interest in applying its expertise, correcting its own errors, making a proper record, and maintaining an efficient, independent administrative system").

The Court should therefore remand EPA's determination regarding Section 8 to the Agency for development of an appropriate record and consideration in light of the Supreme Court's recent decision in Venetie.

CONCLUSION

For the foregoing reasons, this Court should either dismiss the petitions insofar as they relate to Section 17 because they are time-barred or affirm EPA's decision that Section 17 is Indian country under 18 U.S.C. § 1151(a). The Court should remand EPA's determination regarding Section 8 for development of a record and consideration in light of the Supreme Court's recent decision in Venetie.

STATEMENT REGARDING REASONS FOR ORAL ARGUMENT

EPA concurs with Petitioners that this is a complex case and that oral argument will aid the Court in understanding the complex procedural history and voluminous record in this matter.

April 17, 1998

Respectfully submitted,

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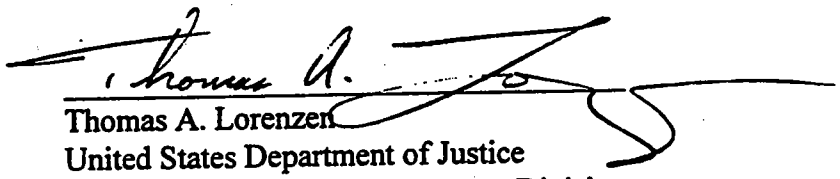

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CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of April 1998, two true and correct copies of the foregoing Brief of Respondent Environmental Protection Agency were served on each of the following individuals by first class mail, postage prepaid:

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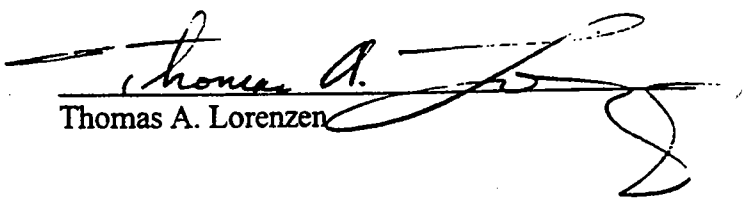
I also hereby certify that, on this 17th day of April 1998, the original and seven copies of the foregoing Brief of Respondent Environmental Protection Agency were sent by overnight courier to the Clerk of the United States Court of Appeals for the Tenth Circuit for filing.



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